Rules of Civil Procedure

Rule 1. Scope of Rules.

These rules shall govern the procedure in the circuit courts in all suits or actions of a civil nature with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

HISTORY

Amended November 18, 1996, effective March 1, 1997; amended May 24, 2001, effective July 1, 2001.

Rule 2. One Form of Action.

There shall be one form of action to be known as "civil action."

Addition to Reporter's Notes, 2001 Amendment: The second sentence, which provided that actions in equity were to be brought in chancery court and actions at law in circuit court, has been deleted in conformity with Constitutional Amendment 80, under which the circuit courts are the state's "trial courts of original jurisdiction." The effect of this change in the rule is to merge law and equity, as contemplated by Amendment 80. As the U.S. Supreme Court observed with respect to the corresponding federal rule, "law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court." *Ross v. Bernhard*, 396 U.S. 531, 540 (1970).

The merged system is to be contrasted with and distinguished from the prior practice in Arkansas during the period in which chancery courts had not been created in all counties. In counties without chancery courts, the circuit court "was a court of dual jurisdiction, the judge presiding in one division or 'on the law side' as a superior court of common law, and also sitting in chancery as judge of a court of equity...." *Morgan Utilities, Inc. v. Perry County*, 183 Ark. 542, 547, 37 S.W.2d 74, 77 (1931). With the merger of law and equity, there are not separate law and equity "sides" of the circuit court.

Although law and equity have been merged, equitable principles may be applied where appropriate. This has been so in the federal courts. *E.g.*, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected"); *In re United States Brass Corp.*, 110 F.3d 1261, 1267 (7th Cir. 1997) ("Ever since law and equity were merged in the federal courts ... more than a half century ago, the courts have had a free hand in importing equitable defenses into suits at law"). Moreover, the merger does not alter substantive rights. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

HISTORY

Amended May 24, 2001, effective July 1, 2001.

Rule 3. Commencement of Action; "Clerk" Defined; Separate Actions and Filing Fees; Notice of Medical Injury.

(a) *Commencement.* A civil action is commenced by filing a complaint with the clerk of the court, who shall note thereon the date and precise time of filing.

(b) *Clerk.* The term "clerk of the court" as used in these rules means the circuit clerk and, with respect to probate matters, any county clerk who serves as ex officio clerk of the probate division of the circuit court pursuant to Ark. Code Ann. § 14-14-502(b)(2)(B). In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement shall be satisfied when the complaint is filed with either the circuit clerk or the county clerk.

(c) *Separate Actions; Filing Fees.*

(1) The clerk shall assign a new case number and charge a new filing fee for the filing of any case that is refiled after having been dismissed.

(2) No other claim or counterclaim for relief, including without limitation, divorce, annulment, separate maintenance, or paternity, shall be asserted in an action filed under the Domestic Abuse Act, Ark. Code Ann. §§ 9-15-101 et seq., but a separate action seeking other relief shall be filed, and the clerk shall assign a new case number and charge a filing fee unless the filing fee is waived pursuant to Rule 72 of these rules.

(3) A petition for adoption cannot be asserted in a guardianship proceeding, but a separate action shall be filed, and the clerk shall assign a new case number and charge a filing fee unless the filing fee is waived pursuant to Rule 72 of these rules.

(d) *Notice of Claim in Actions for Medical Injury.*

(1) Upon enactment of a statute tolling the applicable statute of limitations as provided in paragraph (4) of this subdivision (d), no action for medical injury shall be commenced until at least sixty (60) days after service of a written notice of the claim upon each medical-care provider to be named as a defendant. The notice shall include:

(A) the patient's full name, date of birth, present address, address at the time of the diagnosis, care, treatment, or procedure at issue, and the last four digits of his or her social security number;

(B) the full name and address of the person authorizing the notice and his or her relationship to the patient, if the notice is not sent by the patient;

(C) the date or dates of the diagnosis, care, treatment, or procedure at issue, a summary of the alleged wrongful conduct, and a description of the alleged injury;

(D) the names and addresses of the known medical-care providers who provided any care or treatment relating to the alleged injury; and

(E) an authorization permitting the medical-care provider receiving the notice to obtain the patient's medical records from the medical-care providers listed pursuant to subparagraph (D) of this paragraph (1).

(2) The notice shall be served on a medical-care provider by certified mail, return receipt requested, or by a commercial delivery company qualified under Rule 4(d)(8)(C). For purposes of paragraph (1) of this subdivision (d), service of the notice shall be deemed complete on mailing or on submitting it to a commercial delivery company, and the date of mailing or submission shall be the date of service.

(3) If the notice substantially complies with the requirements of paragraph (1) of this subdivision (d), an ensuing complaint based on the alleged injury shall not be dismissed on the ground that the notice was insufficient or otherwise defective.

(4) This subdivision (d) shall apply to actions filed after the effective date of a statute enacted by the General Assembly providing that when the notice specified in paragraph (1) of this subdivision is served within sixty (60) days before expiration of the applicable statute of limitations, the time for commencement of the action is extended by ninety (90) days after service of the notice, with the date of service determined in accordance with paragraph (2) of this subdivision.

Reporter's Notes to Rule 3:

1. This Rule changes Arkansas law. The statute, Ark. Stat. Ann. § 27-301 (Repl. 1962), which is superseded by this rule provided, in part, that an action was commenced by filing a complaint and placing it and a summons in the hands of the sheriff of the proper County. Under this Rule, an action will commence without regard to receipt by the process server, subject only to the requirement that service be completed within 60 days from the filing of the complaint, unless the time for service has been extended by the Court.

2. This rule will do away with uncertainty in "race to venue" and statute of limitation cases as to where or when the action was first commenced. It will also do away with the need to decide whether the Complaint and Summons have been placed in the hands of the sheriff with reasonable expectations of service or whether the Complainant has acted in good faith in trying to effect service. *See Williams v. Edmondson and Ward,* 257 Ark. 837, 250 S.W.2d 260 (1975). Instead, where service is in issue under the 60 days or extension proviso, actual service will be the standard. If actual service is not made within 60 days, the Court may extend the time for service, thus protecting the plaintiff against the running of the statute where there is good cause to do so.

3. FRCP 3 contains no proviso regarding the obtaining of service of process within a specified period after the complaint is filed. Federal courts are thus plagued with the question whether filing a complaint tolls the statute of limitations where there is an allegation of lack of diligence in obtaining service. *See* Wright and Miller, *Federal Practice and Procedure*, 1056 (1969). This rule will effectively cause the decision whether delay in service is justified to be made within 60 days of filing rather than at some indefinite later time.

4. The term "proper court" means one which has jurisdiction of the subject matter and parties described in the complaint and in which venue is properly laid.

Addition to Reporter's Notes, 1983 Amendment: The words of the first sentence of the rule were changed from "precise date and time of filing" to "date and precise time of filing." A second sentence of the rule had provided that an action would not be deemed commenced unless service were obtained within 60 days of filing, with provisions for extension of the time limit. That sentence was deleted, and the matter of the time within which service must be obtained is addressed in Rule 4(i).

Addition to Reporter's Notes, 2001 Amendment: The word "proper," which modified "court" in the original version of the rule, has been deleted. Also, the one sentence that comprised the rule has been designated as subdivision (a) and a new subdivision (b) added to define the term "clerk of the court." As the original Reporter's Notes accompanying this rule make plain, the "proper court" was one with jurisdiction over the subject matter. When the rule was adopted in 1978, that jurisdiction was divided among three courts - circuit, chancery, and probate. Under Constitutional Amendment 80, however, the circuit court is the single trial court of general jurisdiction. The original Reporter's Notes to this rule also state that the term "proper court" referred to the court "in which venue is properly laid." This issue has since been addressed in Rule 12(h)(3), which provides that in cases where venue is improper, the court may either "dismiss the action or direct that it be transferred to a county where venue would be proper." In the event of a transfer pursuant to this provision, the action remains "commenced" as of the date of the original filing. If the action is dismissed, it was nonetheless commenced for statute of limitations purposes and may be refiled within one year under the savings statute, Ark. Code Ann. § 16-56 126. *See Forrest City Machine Works v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993) (savings statute is applicable when action is dismissed for insufficient service of process). Subdivision (b) has been added in light of Administrative Order No. 14 of the Supreme Court and Act 997 of 2001. The order, adopted pursuant to Section 6(B) of Amendment 80, requires the judges of each judicial circuit to establish the following divisions: criminal, civil, juvenile, probate, and domestic relations divisions. Act 997, which amended Ark. Code Ann. 14-14-502(a)(2)(B), provides that in those counties in which county clerks have been elected, the county clerk "may be ex officio clerk of the probate division of circuit court, if such division exists, of the county until otherwise provided by the General Assembly." Consequently, in some counties probate proceedings will be initiated by a filing in the county clerk's office, and in such cases the county clerk will be the "clerk of the court" for other purposes under these Rules. Most probate matters are "special proceedings" within the meaning of Rule 81(a) and thus governed by statutory procedures, if any, rather than by these Rules. *See, e.g., In re Adoption of Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997) (adoption); *Screeton v. Crumpler*, 273 Ark. 167, 617 S.W.2d 847 (1981) (probate of will). However, some probate matters are civil actions. *See, e.g.*, *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1974) (proceeding by which a claim

against the estate of a deceased person is reduced to judgment is a civil action). The status of a particular probate matter as a special proceeding or a civil action has no bearing on where the papers are to be filed. Filing in the wrong clerk's office is not fatal, and the action is commenced as of the filing date. *Cf. Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 562 (1995) (the timely filing of the complaint in chancery court tolled the statute of limitations even though the case should have been brought in circuit court and was transferred there after statute had run).

Addition to Reporter's Notes, 2003 Amendment: The statutory reference in subdivision (b) has been corrected.

Addition to Reporter's Notes, 2005 Amendment: Rule 3(b) has been amended. As the Rule states, in some counties the county clerk serves as the ex officio clerk of the probate division of the circuit court. Uncertainties have arisen in these circumstances about the effect of filing a pleading or paper with the wrong clerk. A sentence has been added to subsection (b) to make plain that, in these counties, a party complies with Rule 3(a) when the complaint is file marked by either the circuit clerk or the county clerk. This new provision accords with pre-Amendment 80 cases. *Cf., Linder v. Howard*, 296 Ark. 414, 415-18, 757 S.W.2d 549, 550-51 (1995) (the timely filing of a complaint in chancery court tolled the statute of limitations even through the case should have been brought in circuit court and was transferred there after the statute had run.). Similar clarifying language has been added to Rule of Civil Procedure 5(c)(1) (filing papers in general), Administrative Order Number 2 (clerk's docket and filing), and Rule of Appellate Procedure - Civil 3(b) (filing a notice of appeal).

Addition to Reporter's Notes, 2011 Amendment: The amendment adds a new subdivision (c) to clarify that a new case number is to be assigned and a new filing fee charged for a case re-filed after having been dismissed. The new case number and filing fee requirements apply to cases voluntarily or involuntarily dismissed under Rule 41. The new case number and filing fee requirements do not apply to cases that have not been dismissed but have been closed subject to reopening depending on further developments in the case. Consequently, the requirements do not apply to requests for modification of visitation, custody, or child support provisions in domestic relation cases; the filing of motions for contempt citations; and other requests for court orders in cases that have been closed, but not dismissed. However, other fees or charges authorized by law, such as case reopening fees, may be imposed.

Addition to Reporter's Notes (2015 Amendment): New subdivision (d) resolves the separation-of-powers issue at the core of *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992). There, the supreme court invalidated a statute which, contrary to Rule 3, conditioned commencement of an action for medical injury upon providing written notice of the claim to the defendant. Subdivision (d) adds this requirement to the rule, effective upon the General Assembly's enactment of a companion limitations-tolling provision.

The contents of the notice in paragraph (1) of subdivision (d) are based on Ark. Code Ann. § 16-114-212, added by Section 22 of Act 649 of 2003. Under section 16-114-212, notice is optional and is presumably given only when the plaintiff needed to take advantage of the tolling provision. The statute is deemed superseded pursuant to Ark. Code Ann. § 16-11-301 when subdivision (d) becomes effective.

Subdivision (d)(1)(C) is intended to require some notice of not only the injury but also what the defendant is alleged to have done wrong. In subdivision (d)(1)(D), the language "who provided any care or treatment" is intended to make clear that the list of providers is not limited to those who contributed to the injury and includes those who subsequently treated or cared for the patient.

For housekeeping purposes, former subdivisions (d) and (e) of the rule have been added as separate paragraphs to subdivision (c).

HISTORY

Amended May 16, 1983; amended May 24, 2001, effective July 1, 2001; amended March 13, 2003; amended February 10, 2005; amended July 1, 2011 by per curiam order June 2, 2011; amended February 23, 2012 [per curiam order]; amended February 26, 2015, subdivision (d) effective upon enactment of tolling statute).

Rule 4. Summons and Service of Process.

(a) *Issuance of Summons.* Immediately on the filing of the complaint, the clerk shall issue a summons to the plaintiff or the plaintiff's attorney, who shall deliver it for service to a person authorized by subdivision (c) of this rule to serve process.

(b) *Form of Summons.* The summons shall be styled in the name of the court and issued under its seal, dated and signed by the clerk or a deputy clerk, and directed from the State of Arkansas to the defendant to be served. It shall contain:

(1) in its caption, the names of the plaintiff and defendant or, if there are multiple parties, the names of the plaintiff and defendant listed first in the complaint;

(2) the address of the defendant to be served, if known;

(3) the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff;

(4) the time within which these rules require that the defendant to be served must appear, file a responsive pleading or motion, and defend; and

(5) notice that the defendant's failure to appear, respond, and defend within the time allowed may result in entry of judgment by default against the defendant for the relief demanded in the complaint.

(c) *Process: Defined; By Whom Served.* (1) For purposes of this rule, the term "process" means the summons and a copy of the complaint, which shall be served together. The plaintiff or the plaintiff's attorney shall furnish the person making service with as many copies as are necessary.

(2) The following persons are authorized to serve process:

(A) the sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action;

(B) any person appointed pursuant to Administrative Order No. 20 for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made;

(C) any person authorized to serve process under the law of the place outside this state where service is made; and

(D) in the event of service by mail or commercial delivery company pursuant to subdivision (g)(1) and (2) of this rule, the plaintiff or an attorney of record for the plaintiff.

(d) *Proof of Service.* The person effecting service shall make proof of service to the clerk within the time during which the person served must respond to the summons. Failure to make proof of service, however, shall not affect the validity of service.

(1) Proof of service may be made by executing a certificate of service contained in the same document as the summons. If service is made by a person other than a sheriff or his or her deputy, the certificate shall be sworn. If service has been by mail or commercial delivery company, the person making service shall attach a return receipt, envelope, affidavit, acknowledgment, or other writing required by subdivision (g)(1) and (2) of this rule.

(2) If service is made by warning order, proof of service shall be made as provided in subdivision (g)(3) of this rule.

(3) Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in subdivision (h)(4) of this rule, shall be made in accordance with the applicable treaty or convention. Form

(e) *Amendment.* At any time in its discretion and on terms as it deems just, the court may allow any summons or proof of service to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons is issued.

(f) *Personal Service Inside the State.* Service of process shall be made inside the state as follows:

(1) *Natural Persons.* If the defendant is a natural person at least 18 years of age or emancipated by court order, by:

(A) delivering a copy of the process to the defendant personally, or if he or she refuses to receive it after the process server makes his or her purpose clear, by leaving the papers in close proximity to the defendant;

(B) leaving the process with any member of the defendant's family at least 18 years of age at a place where the defendant resides; or

(C) delivering the process to an agent authorized by appointment or by law to receive service of summons on the defendant's behalf.

(2) *Minors.* If a defendant is less than 18 years of age and has not been emancipated by court order, by delivering the process to the defendant's father, mother, or guardian or, if there be none in the state, to any person at least 18 years of age in whose care or control the minor may be or with whom the minor resides.

(3) *Incapacitated Persons.* If a plenary, limited, or temporary guardian has been appointed for an incapacitated person, or if a conservator has been appointed for a person who by reason of advanced age or physical disability is unable to manage his or her property, service shall be on the person and the guardian or conservator.

(4) *Incarcerated Persons.* Service on a person incarcerated in any jail, penitentiary, or other correctional facility in this state shall be on the administrator of the institution, who shall promptly deliver the process to the incarcerated person. A copy of the process shall also be sent to the incarcerated person by first-class mail and marked as "legal mail" and, unless the court otherwise directs, to his or her spouse, if any.

(5) *Corporations.* Service on any corporation, including nonprofit corporations, professional corporations, and cooperatives, shall be on its registered agent for service of process, or the agent's secretary or assistant; any officer of the corporation, or the officer's secretary or assistant; a managing or general agent of the corporation, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(6) *Limited Liability Companies.* Service on a limited liability company shall be on its registered agent for service of process, or the agent's secretary or assistant; a manager of a limited liability company in which management is vested in managers rather than members, or the manager's secretary or assistant; a member of a limited liability company in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant; a managing or general agent of the limited liability company, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(7) *Partnerships.* Service on any type of partnership, including a general partnership, a limited liability partnership, a limited partnership, and a limited liability limited partnership, shall be on any general partner or his or her secretary or assistant; the partnership's registered agent for service of process, or the agent's secretary or assistant; a managing or general agent of the partnership, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(8) *Unincorporated Associations.* Service on an unincorporated association subject to suit under its own name, except a partnership, shall be on its registered agent for service of process, or the agent's secretary or assistant; any manager of the association, or the

manager's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(9) *Defendant Class Actions.* Service on a defendant class shall be on each of the parties named as class representatives in the same manner as if each representative were sued in a separate action.

(10) *Trusts.* Service on a trust shall be on a trustee of the trust, on the trustee's secretary or assistant, or as provided by statute.

(11) *The United States.* Service on the United States or any of its agencies, officers, or employees shall be as authorized by the Federal Rules of Civil Procedure or by other federal law.

(12) *States and State Agencies.* Service on a state or any of its agencies, departments, boards, or commissions subject to suit shall be on the chief executive officer, director, or chairman, any other person designated by appointment or by an applicable statute to receive service of process, or on the Attorney General of the state if service is accompanied by an affidavit of a party or the party's attorney that the officer or designated person is unknown or cannot be located.

(13) *Municipal Corporations.* Service on a municipal corporation shall be on the mayor, city manager, city administrator, or city clerk.

(14) *Counties.* Service on a county shall be on the county judge, county administrator, county clerk, or circuit clerk if no county clerk has been elected.

(15) *School Districts.* Service on a school district shall be on the president of the board of directors, or the superintendent of schools.

(16) *Other Political Subdivisions.* Service on any political subdivision, special district, or quasi-municipal agency not listed in this subdivision shall be on any officer, director, chairman, or manager.

(17) *Public Officers or Employees.* Service on an officer or employee of a government entity listed in paragraphs (12)-(16) of this subdivision, acting in an official capacity, shall be on the officer or employee and by mailing a copy of the process as specified in subdivision (g)(1)(A)(i) of this rule to an official on whom service can be made pursuant to paragraphs (12)-(16), as applicable, and a copy to the Attorney General if a state officer or employee is sued.

(g) *Alternative Methods of Service.* In addition to the methods of service described in subdivision (f) of this rule, process may be served on any defendant except the United States and any of its agencies, officers, or employees by the methods enumerated in this subdivision.

(1) *Service by Mail.* The plaintiff or an attorney of record for the plaintiff shall serve process by mail only as provided in this paragraph.

(A)(i) Certified mail shall be addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. Notwithstanding the foregoing, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document; A United States Postal Service Form 3811 (Domestic Return Receipt-green card) executed as provided in the United States Postal Service procedures in place at the time of service; or an affidavit by a postal employee reciting or showing refusal of the mailed process by the addressee. Failure to claim mail does not constitute refusal for purposes of this paragraph.

(iii) If delivery of mailed process is refused, the plaintiff or attorney making service, promptly on receipt of notice of the refusal, shall mail to the defendant by first-class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the defendant appears to defend the suit.

(iv) A judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

(B)(i) First-class mail, postage prepaid, shall be addressed to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender.

(ii) If no acknowledgment of service is received by the sender within 20 days after the date of mailing, service of process shall be made in a manner other than by mail or by commercial delivery company.

(iii) Unless good cause is shown for not doing so, the court shall order the payment of the costs of service by the person served if that person does not complete and return, within 20 days after mailing, the notice and acknowledgment of receipt of summons. The notice and acknowledgment of receipt of process shall be executed under oath or affirmation.

(2) *Service by Commercial Delivery Company.* The plaintiff or an attorney of record for the plaintiff shall serve process by commercial delivery company only as provided in this paragraph.

(A) The documents must be addressed to the person to be served and delivered by a commercial delivery company that (1) obtains signatures of recipients, (2) maintains permanent records of actual delivery, and (3) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

(B) The process must be delivered to the defendant or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained.

(C)(i) Service pursuant to this paragraph (2) shall not be the basis for a judgment by default unless the record reflects actual delivery on, and the signature of, the defendant or agent, or an affidavit by an employee of an approved commercial delivery company reciting or showing refusal of the process by the defendant or agent.

(ii) If delivery of process is refused, the plaintiff or attorney making the service, promptly on receipt of notice of the refusal, shall mail to the defendant by first class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the defendant appears to defend the suit.

(iii) Any judgment by default may be set aside pursuant to Rule 55(c) if the court finds that someone other than the defendant or agent signed the receipt or refused the delivery or that the commercial delivery company had not been approved as required by this paragraph.

(3) *Service by Warning Order.* If the plaintiff seeks a judgment that affects or may affect the rights of persons who need not be subject personally to the jurisdiction of the court, service may be by warning order issued by the clerk. On the filing by the plaintiff or his or her attorney of an affidavit showing that, after diligent inquiry, the identity or whereabouts of the defendant remains unknown, the clerk shall issue a warning order to be published in a newspaper of general circulation as described in paragraph (B) or posted at the courthouse as provided in paragraph (C).

(A) The warning order shall state the caption of the pleadings; briefly describe the nature of the action and the relief sought; include, if applicable, a description of the property or other res to be affected by the judgment; and warn the defendant or interested person to appear within 30 days from the date of first publication of the warning order or face entry of judgment by default or be otherwise barred from asserting his or her interest.

(B)(i) The party seeking judgment shall cause the warning order to be published weekly for two consecutive weeks in a newspaper having general circulation in the county where the action is filed and to be sent, with a copy of the complaint, to the defendant or interested person at his or her

last known address by certified mail as provided in paragraph (1)(A)(i) of this subdivision.

(ii) As used in this subdivision, the term "newspaper" means a printed publication in the English language of no less than four pages that has been disseminated without interruption at least once a week for the preceding 12 months in the county where the action has been filed, holds a second-class mailing permit, has at least 50-percent paid circulation, and devotes an average of 40 percent of its space to news and information of interest to the general public.

(iii) Proof of publication shall be by affidavit of the editor, proprietor, or business manager of the newspaper, with a copy of the published notice attached, stating the dates on which the notice appeared.

(C) If the party seeking judgment has been granted leave to proceed as an indigent without prepayment of costs, the clerk shall conspicuously post the warning order for a continuous period of 30 days at the courthouse or courthouses of the county where the action is filed. The party seeking judgment shall cause the warning order and a copy of the complaint to be sent to the defendant or interested person at his or her last known address by certified mail as provided in paragraph (1)(A)(i) of this subdivision. Newspaper publication of the warning order is not required. Proof of posting shall be by a letter or other statement signed by the clerk stating the location and dates on which the warning order was posted.

(D) No judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published or posted. The affidavit shall be accompanied by the required proof of publication or posting of the warning order. If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person.

(4) *Service as Directed by Court Order.* On motion without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by this rule, the court may order service by any method or combination of methods reasonably calculated to apprise the defendant of the action, including service by warning order meeting the minimum requirements of paragraph (3)(A)-(D) of this subdivision.

(h) *Service Outside the State.* Whenever the law of this state authorizes service outside this state, service, when reasonably calculated to apprise the defendant of the action, may be made:

(1) By personal delivery in the same manner prescribed for service within this state;

(2) In any manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

(3) By mail or commercial delivery company as provided in subdivision (g)(1) and (2) of this rule;

(4) As directed by a foreign authority in response to a letter rogatory or pursuant to the provisions of any treaty or convention pertaining to the service of a document in a foreign country;

(5) By any method or combination of methods as directed by order of the court on motion, without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by this rule.

(i) *Time Limit for Service.* (1) If service of process is not made on a defendant within 120 days after the filing of the complaint or within the time period established by an extension granted pursuant to paragraph (2), the action shall be dismissed as to that defendant without prejudice on motion or on the court's initiative. If service is by mail or by commercial delivery company pursuant to subdivision (g)(1) and (2) of this rule, service shall be deemed to have been made for purposes of this subdivision on the date that the process was accepted or refused.

(2) The court, on written motion and a showing of good cause, may extend the time for service if the motion is made within 120 days of the filing of the suit or within the time period established by a previous extension. To be effective, an order granting an extension must be entered within 30 days after the motion to extend is filed, by the end of the 120-day period, or by the end of the period established by the previous extension, whichever date is later.

(3) This subdivision shall not apply to service in a foreign country pursuant to subdivision (h) of this rule or to complaints filed against unknown tortfeasors.

(j) *Service of Other Writs and Papers.* Whenever any rule or an applicable statute requires service on any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, the notices, writs or papers may be served in the manner prescribed in this rule for service of process. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

(k) *Disregard of Error; Actual Notice.* Any error as to the sufficiency of process or the sufficiency of service of process shall be disregarded if the court determines that the serving party substantially complied with the provisions of this rule and that the defendant received actual notice of the complaint and filed a timely answer.

(l) Waiver. A party seeking to affirmatively waive sufficiency of service and sufficiency of process shall do so in writing. A waiver pursuant to this subdivision: (1) is not effective unless filed with the clerk and served on all parties as provided in Rule 5; and (2) does not of itself waive any other defense.

FORM OF SUMMONS

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is pursuant to Rule 4(c), (f), and (h) of the Arkansas Rules of Civil Procedure. The form incorporates a proof of service to be made by a sheriff, deputy sheriff, or other person, as appropriate, in accordance with Rule 4(g).

The form may be modified as needed in special circumstances, and additional notices, if required, should be inserted as appropriate. Examples include the notices required by statute in unlawful-detainer and replevin actions, see Ark. Code Ann. §§ 18-60-307(a) and 18-60-808(a), and the notice of the consent jurisdiction of a state district court that must be included pursuant to Ark. Sup. Ct. Admin. Order No. 18(6)(d)(1).

This form is not for use in cases of constructive service pursuant to Rule 4(g)(3). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

Effective July 1, 2012

Corrected August 14, 2012

Revised January 1, 2019

Form

Reporter's Notes (2019 Amendment): In the introduction to the summons form, the second paragraph now provides that the form "may be modified as needed in special circumstances." It also states that "[a]dditional notices, if required, should be inserted as appropriate." The revised form combines these sentences and adds a sentence listing examples of the notices that may be "inserted as appropriate," including the notice of consent jurisdiction that is required by Administrative Order No. 18(6)(d)(1).

THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

_____ DIVISION [Civil, Probate, etc.]

_____
Plaintiff
v. No. _____

_____
Defendant

SUMMONS

THE STATE OF ARKANSAS TO DEFENDANT:

_____ [Defendant's name and address.]

_____

A lawsuit has been filed against you. The relief demanded is stated in the attached complaint. Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you are incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure.

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are: _____

If you fail to respond within the applicable time period, judgment by default may be entered against you for the relief demanded in the complaint.

Additional Notices Included: _____
CLERK OF COURT

Address of Clerk's Office

_____

_____

_____
[Signature of Clerk or Deputy Clerk]
Date: _____

[SEAL]

No. _____ This summons is for _____ (name of Defendant).

PROOF OF SERVICE

On _____ [date] I personally delivered the summons and complaint to the defendant at _____ [place]; or

After making my purpose to deliver the summons and complaint clear, on _____ [date] I left the summons and complaint in the close proximity of the defendant by _____ [describe how the summons and complaint was left] after he/she refused to receive it when I offered it to him/her; or

On _____ [date] I left the summons and complaint with _____, a member of the defendant's family at least 18 years of age, at _____ [address], a place where the defendant resides; or

On_____[date] I delivered the summons and complaint to _____ [name of individual], an agent authorized by appointment or by law to receive service of summons on behalf of _____ [name of defendant]; or

On _____ [date] at _____ [address], where the defendant maintains an office or other fixed location for the conduct of business, during normal working hours I left the summons and complaint with_____

[name and job description]; or

I am the plaintiff or an attorney of record for the plaintiff in a lawsuit, and I served the summons and complaint on the defendant by certified mail, return receipt requested, restricted delivery, as shown by the attached signed return receipt.

I am the plaintiff or attorney of record for the plaintiff in this lawsuit, and I mailed a copy of the summons and complaint by first-class mail to the defendant together with two copies of a notice and acknowledgment and received the attached notice and acknowledgment form within twenty days after the date of mailing.

Other [specify]:

I was unable to execute service because:

My fee $ _____

To be completed if service is by a sheriff or deputy sheriff:

Date: _____

SHERIFF OF _____ COUNTY, ARKANSAS

By: _____

[signature of server] _____

_____

[printed name, title, and badge number]

To be completed if service is by a person other than a sheriff or deputy sheriff:

Date: _____

By:_____

[signature of server] _____

_____

[printed name]

Address: _____

Phone: _____

Subscribed and sworn to before me this date: _____

Notary Public _____

My Commission Expires: _____

Additional information regarding service or attempted service: _____

_____

COMMENT

Addition to Reporter's Notes, 2014 Amendment: For clarity, Rule 4(i) has been restructured and divided into paragraphs. Also, the sentence dealing with refusal to accept service that now appears in paragraph (1) has been limited to service by mail under subdivision (d)(8)(A) or by commercial delivery company under subdivision (d)(8)(C). The result of this change is to exclude service by first class mail pursuant to subdivision (d)(8)(B), under which refusal plays no role.

More significantly, the subdivision has been revised to make clear that a motion to extend the time for service is proper if filed within 120 days of the filing of the complaint or within the time period provided by a previous extension of time. Although the subdivision did not address subsequent extensions, they have long been considered proper in light of *Dougherty v. Sullivan*, 318 Ark. 608, 887 S.W.2d 305 (1994). *See also Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004); *Wilkins v. Food Plus*, Inc., 99 Ark. App. 64, 257 S.W.3d 107 (2007). The Court of Appeals, however, held in *Powell v. Fernandez*, 2013 Ark. App. 595, that a subsequent extension is allowed only if sought within 120 days of the filing of the complaint. The amendment overrules Powell on this point.

Reporter's Notes (2019 Amendment). Rule 4 has undergone several modifications since it became effective in 1979. The 2019 amendment substantially revises and reorganizes the rule.

Subdivision (a). The amendment reflects more clearly the actual practice envisioned by the Reporter's Notes to the original version of the rule. As there stated: "Whereas FRCP 4 places the onus of delivering process to the server upon the Clerk, this Rule permits the Clerk to 'cause it to be delivered,' thus contemplating placing the summons with the plaintiff's attorney who then will see to it that it is served by an appropriate official."

Subdivision (b). This subdivision has been revised to accommodate electronic filing and to reflect current law. The introductory section to the official summons form has also been modified.

New language in subdivision (b) provides that, in multiple-party cases, only the first-listed party on each side of the case must be listed in the caption. This revision is necessary because of electronic filing software and is consistent with *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004), in which the Supreme Court refused to read the original version of the rule

to require "a listing of every plaintiff and every defendant on every summons, no matter how many plaintiffs and defendants are parties to the case." *Id.* at 123, 186 S.W.3d at 729.

Similarly, the phrase "directed from the State of Arkansas to the defendant to be served" has been added to reflect the holding of *Gatson v. Billings*, 2011 Ark. 125. There the Supreme Court held that Rule 4(b) must be read in conjunction with Ark. Const. art. 7, § 49, which provides that "[a]ll writs and other judicial process, shall run in the name of the State of Arkansas." The new provision also makes plain that the defendant "to be served" is identified here; in a case with multiple defendants, this defendant's name will not necessarily appear in the caption.

Another change requires the summons to contain "the address of the defendant to be served, if known." This provision makes the rule's text consistent with the official summons form, which contains a space for the address of the defendant being served. The amended rule recognizes, however, that the defendant's address may not be known at the time the complaint is filed and the summons issued.

The introductory section of the official summons form has been divided into three paragraphs. The second paragraph lists examples of additional notices that may be included: those required by statute in unlawful-detainer actions and in replevin actions, plus the notice of consent jurisdiction of state district courts required by Administrative Order No. 18.

Subdivision (c). This subdivision has been amended by adding a new paragraph (1) and designating the previous text as paragraph (2). The latter is unchanged except for a revised cross-reference. The new first paragraph defines "process" for purposes of the rule to include the summons and complaint and requires, as did a sentence in subdivision (d) in the previous version of the rule, that they be served together.

Subdivision (d). This subdivision addresses proof of service; for the most part it is the same as former subdivision (g) but has been divided into three paragraphs. The introductory material consists of the first and second sentences of former subdivision (g) with one stylistic change. Paragraph (1) is based on the third and fourth sentences of the previous version, rewritten to conform to the official summons form. Paragraph (2), which cross-references the proof-of-service provision for warning orders, is new. Paragraph (3) is identical to the last sentence of former subdivision (g) with the exception of the cross-reference.

Subdivision (e). This subdivision, which governs amendment of the summons and proof of service, tracks former subdivision (h).

Subdivision (f). A substantially revised version of former subdivision (d), this provision addresses personal service inside the state. It clarifies the prior rule as to service on individuals, entities, and organizations and in some instances expands the opportunities for service. Alternative methods for serving these defendants (except the United States and its agencies, officers, and employees) are set out in subdivision (g).

Paragraph (1)(A) spells out so-called "refusal service" in more detail, drawing on such cases as *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000), and *Riggin v. Dierdorff*, 302 Ark. 517, 790 S.W.2d 897 (1990). The process server must, after "mak[ing] his or her purpose clear," leave

the summons and complaint "in close proximity" to a defendant who refuses to accept the documents.

In paragraph (1)(B), the phrase "a place where the defendant resides" replaces its counterpart in former paragraph (d)(1), "dwelling house or usual place of abode." The effect of this change is to overturn *State Office of Child Support Enforcement v. Mitchell,* 330 Ark. 338, 954 S.W.2d 907 (1997), which defined the latter phrase in terms of domicile: a person's "fixed permanent home, the place to which he has—whenever absent—the intention of returning." *Id*. at 344, 954 S.W. 2d at 910. Residence and domicile are not synonymous; a person can have multiple residences but only one domicile. *See Leathers v. Warmack,* 341 Ark. 609, 19 S.W.3d 27 (2000); *Lawrence v. Sullivan,* 90 Ark. App. 206, 205 S.W.3d 168 (2005). This change makes Arkansas practice consistent with that in other jurisdictions whose courts have rejected the narrow approach taken in *Mitchell. See, e.g., Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253 (2d Cir. 1991); *United States v. Tobin,* 483 F. Supp. 2d 68 (D. Mass. 2007); *Blittersdorf v. Eikenberry,* 964 P.2d 413 (Wyo. 1998); *Sheldon v. Fettig,* 919 P.2d 1209 (Wash. 1996); *Van Buren v. Glasco,* 217 S.E.2d 579 (N.C. 1975), overruled on other grounds by *Love v. Moore,* 291 S.E.2d 141 (N.C. 1982).

Paragraph (1)(B) also provides that the person receiving the process (summons and complaint) must be a family member who is at least 18 years old. Under former paragraph (d)(1), the recipient could be anyone 14 years of age or older residing in the defendant's place of abode. *See Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1997) (cook); *Nowell v. Nowell,* 384 F.2d 951 (5th Cir. 1967), *cert. denied,* 390 U.S. 956 (1968) (resident manager of apartment complex who lived in separate building); *Nat'l Dev. Co., supra (*housekeeper); *Barclays Bank v. Goldman,* 517 F. Supp. 403 (S.D.N.Y. 1981) (maid). The changes are intended to make actual notice to the defendant more likely.

Paragraph (2) clarifies service on minors and recognizes that, under Arkansas law, the age of majority is 18. Until that age is attained, all persons "shall be considered minors." Ark. Code Ann. § 9-25-101(a). The former rule permitted service on an individual at least 14 years of age and required service on parents or guardians of younger defendants. Paragraph (2) also takes into account minors emancipated by court order. See Ark. Code Ann. §§ 9-26-104, 9-27-362.

In paragraph (3), the term "incapacitated person" refers to a person who is "impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate." Ark. Code Ann. § 28-65-101(5)(A). The appointment of a conservator requires the consent of the person who, because of advanced age or physical infirmity, can no longer manage his or her own financial affairs. *Id.* §§ 28-67-103, 28-67-105. A conservator has the same powers and duties as a guardian, except as to the custody of the person. *Id.* § 28-67-108.

Paragraph (4), which provides for service on incarcerated persons, largely tracks former subdivision (d)(4).

With respect to corporate entities, paragraph (5) expressly applies to "any corporation," including nonprofit corporations, professional corporations, and cooperatives. *See* Ark. Code Ann. §§ 4-28-201 et seq. (nonprofit corporations); §§ 4-29-201 et seq. (professional corporations); §§ 4-29-301 et seq. (medical corporations); §§ 4-29-401 et seq. (dental corporations); §§ 4-30-101 et seq. (cooperatives). In light of the word "any," this list is obviously not exclusive; for example, the provision reaches foreign corporations as well as those formed under Arkansas law.

Paragraph (5) retains the provisions of former subdivision (d)(5) authorizing service on a corporation's officer, managing or general agent, or any agent authorized by appointment or by law to receive service. It also permits, as did the opening clause of former subdivision (d), service as provided by statute. But paragraph (5) adds other options, including the corporation's registered agent and an officer's secretary or assistant. Although the holdover term "managing or general agent" is not defined, the Supreme Court has offered the following guidance:

> [T]he person . . . must have some measure of discretion in operating some phase of the defendant's business or in the management of a given office [and] such status that common sense would trust him to see that the summons gets promptly into the hands of the right corporate people.

Lyons v. Forrest City Mach. Works, Inc., 301 Ark. 559, 561, 785 S.W.2d 220, 221 (1990) (plant manager, who had worked for corporate defendant for 32 years, was a managing or general agent). *See also May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990) (bookkeeper who was "more or less in charge" of office at time of service held to be a managing or general agent).

Paragraph (6) addresses service on limited liability companies. It is based on paragraph (5) but contains language specific to the structure of limited liability companies. In particular, it provides for service on (1) a manager of the LLC if management is vested in managers rather than the members, or on the manager's secretary or assistant; or (2) a member of the LLC if management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant. This language is based on that in Colo. R. Civ. P. 4(e)(4)(C) & (D). See *also* N.Y. Civ. P.L. section 311-a.

Service on any type of partnership, including a general partnership, a limited liability partnership, a limited partnership, and a limited liability limited partnership, is governed by paragraph (7). It provides for service on any general partner or his or her secretary or assistant; the partnership's registered agent for service of process, or the agent's secretary or assistant; a managing or general agent of the partnership, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by statute.

Under the Revised Uniform Partnership Act, Ark. Code Ann. §§ 4-46-101 et seq., a general partnership can be sued in its own name, but a judgment against the partnership cannot be satisfied from a partner's individual assets unless there is also a judgment against that partner. *Id.* § 4-46-307(a) & (c). Generally, partners are jointly and severally liable for all obligations of the partnership. *Id.* § 4-46-306. They are also agents of the partnership for purposes of its business. *Id.* § 4-46-301(1).

A limited liability partnership must designate a registered agent if it has no office in this state, as must a foreign limited liability partnership. *Id.* §§ 4-46-1001(c), 4-46-1102(a). Service of process is made on the registered agent or the agent's secretary or assistant. A partnership becomes a limited liability partnership by a vote of the partners and by filing a "statement of qualification" with the Secretary of State. *Id.* § 4-46-1001. A foreign LLP must file a "statement of foreign qualification" before transacting business in the state. *Id.* § 4-46-1102. An obligation of a limited liability partnership is solely the obligation of the partnership. *Id.* § 4-46-306(c).

Domestic limited partnerships and foreign limited partnerships doing business in Arkansas must have a registered agent in the state. *Id.* § 4-47-114. Each general partner is an agent of the limited partnership for the purposes of its activities. *Id.* § 4-47-402. The certificate filed with the Secretary of State must state "whether the limited partnership is a limited liability limited partnership." *Id.* § 4-47-201 (a)(4). Although a limited partnership is an entity distinct from its partners, *id.* § 4-47-104, each general partner is for the most part jointly and severally liable for all obligations of the limited partnership. *Id.* § 4-47-404. If the partnership elects LLP status, however, each general partner enjoys a complete shield from liability. *Id.* § 4-47-404(c). A judgment against a limited partnership alone is not a judgment against a general partner and cannot be satisfied from a general partner's assets. To reach those assets, the plaintiff must join a general partner as a party in the action against the limited partnership or proceed against that partner in a separate action. *Id.* § 4-47-405.

Paragraph (8) covers service on unincorporated associations, other than partnerships, subject to suit in their own names. This category at present appears limited to unincorporated nonprofit associations governed by the Revised Uniform Unincorporated Nonprofit Association Act, Ark. Code Ann. §§ 4-28-601 et seq. Under the Act, an unincorporated association of this type "may sue or be sued in its own name." *Id.* § 4-28-609(a). The term "registered agent" in paragraph (8) is intended to include an agent that an unincorporated nonprofit association authorizes to receive service of process by filing a statement with the Secretary of State. See *id.* § 4-28-611. Paragraph (8) also provides for service on "any manager of the association, " as does § 4-28-612.

Apart from the Revised Uniform Unincorporated Nonprofit Association Act, Arkansas follows the common-law rule that an unincorporated association cannot be sued in its own name. *See, e.g., Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960). However, members of the association can be sued as a class by naming representative parties as defendants. This practice is reflected in Rule 23.2. *See Ark. Cty. Farm Bureau v. McKinney* 334 Ark. 582, 976 S.W.2d 945 (1998). Service of process is on the named representatives of the class.

Paragraph (9) addresses service in defendant class actions, whether against unincorporated associations under Rule 23.2 or in other cases under Rule 23. Service on a defendant class shall be on each of the parties named as class representatives in the same manner as if each representative were sued in a separate action. The intent is to incorporate the various methods of service depending on the type of class representative—natural person, corporation, etc.—as provided for in subdivision (f) of this rule. The plaintiff selects the representative defendants and has the burden to convince the court that they will adequately protect the interests of the defendant class. 7A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1770 (3d ed.).

Paragraph (10), providing for service on trusts, had no counterpart in the previous version of the rule. It is based on Colo. R. Civ. P. 7(e)(4)(E).

Paragraph (11), which addresses service on the United States, is essentially the same as former subdivision (d)(6). Similarly, paragraph (12), which applies to service on states and state agencies, is based on former subdivision (d)(7) but is limited to the state government. Paragraphs (13) through (15) are specific provisions for government entities that are not individually addressed in the present rule: cities, counties, and school districts. All other political subdivisions are to be served in accordance with paragraph (16). Finally, paragraph (17) provides for service on public officers and employees, a matter not covered by the current rule. These paragraphs are based in part on Colo. R. Civ. P. 7(e)(6)-(8) & (10)-(11).

Subdivision (g). This subdivision lists four alternative methods of services that may be used on defendants except the United States and its agencies, officers, and employees: mail, commercial delivery company, warning order, and as the court directs. Only the fourth method is new, but some clarifying changes have been made in the provisions governing the other methods.

Paragraphs (1) and (2) essentially maintain the status quo with respect to service by mail and commercial delivery company. In an important change, however, paragraph (1)(A)(i) now requires service by certified mail, rather than "any form of mail addressed to the person to be served with a return receipt requested and delivery restricted." Certified mail meets these requirements and is most often used, while other forms of mail that qualify are not well-suited for service of process. Also, paragraph (1)(A)(ii) has been amended to provide expressly that although the refusal of mail will support a default judgment, failure to claim mail does not constitute a refusal. The Supreme Court so held in *Meeks v. Stevens,* 301 Ark. 464, 785 S.W.2d 18 (1990).

Paragraph (3), which deals with warning orders, departs significantly from former subdivision (f). First, paragraph (3) limits warning orders issued by the clerk to cases in which the plaintiff "seeks a judgment that affects or may affect the rights of persons who need not be subject personally to the jurisdiction of the court"—that is, when jurisdiction is *in rem.* However, if *in personam* jurisdiction over the defendant is necessary, the plaintiff cannot obtain a warning order from the clerk but must seek a court order under paragraph (4).

Second, paragraph (3) requires the plaintiff to submit to the clerk "an affidavit showing that, after diligent inquiry, the identity or whereabouts of the defendant remains unknown." Under the previous versions of the rule, this requirement applied only when *in personam* jurisdiction over the defendant was necessary. *See* Newbern, Watkins & Marshall, *Arkansas Civil Practice & Procedure §* 12:14, n.14. As a matter of due process, however, service by publication of a warning order is a matter of last resort to be employed only if a defendant's whereabouts cannot be ascertained through the exercise of reasonable diligence. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

Third, paragraph (3)(B) establishes the minimum requirements for newspapers in which warning orders may be published and specifies the manner in which proof of publication of the warning order is to be made. The rule was previously silent on these matters. The requirements are drawn

from two statutes, see Ark. Code Ann. §§ 16-3-104 & 16-3-105, which appear in a section of the code inapplicable to warning orders. *Id. §* 16-3-101(e).

Finally, paragraph (3) continues the time period in which the warning order must be published (two consecutive weeks) or posted at the courthouse (30 days). A judgment by default cannot be taken until after 30 days of the date that the warning order was first published or posted.

Under paragraph (4), which is new to Arkansas practice, the court may order any method of service "reasonably calculated to apprise the defendant of the action." To obtain an order, the plaintiff must show by affidavit that, "despite diligent effort," service cannot be obtained using one of the other methods of service. The "diligent effort" standard is analogous to the "diligent inquiry" requirement for warning-order cases requiring *in personam* jurisdiction, and it should be interpreted in the same manner. *See, e.g.*, *Horne v. Savers Federal Sav. & Loan Ass'n,* 295 Ark. 182, 747 S.W.2d 580 (1988); *Scott v. Wolfe,* 2011 Ark. App. 438, 384 S.W.3d 609.

As noted above, paragraph (4) requires a warning order issued by the court when *in personam* jurisdiction over the defendant is necessary. This change from prior practice, under which all warning orders were issued by the clerk, is a safeguard prompted by due process considerations. As one court has observed: "Notice by publication, constitutionally suspect in 1950, is even more vulnerable today, given the precipitous decline in newspaper readership." *In re E.R.,* 385 S.W.3d 552, 560–61 (Tex. 2012).

Subdivisions (h)–(j). With minor exceptions, subdivision (h) tracks former subdivision (e). Its subheading has been revised to better reflect the content of the rule ("Service Outside the State"), and paragraph (3) has been updated to include service by commercial delivery company. In addition, paragraph (5) has been rewritten to make plain that service "as directed by the court" is permissible only upon a showing that the other methods listed in subdivision (f) have, despite diligent effort, proved unsuccessful. Stylistic changes have been made in subdivisions (i) and (j), and the cross-references in the former have been changed. Subdivision (i) provides that a motion to extend the time for service is proper if filed within 120 days of the filing of the complaint or within the time period provided by a previous extension of time. The rule was amended in 2014 to expressly address subsequent extensions and to overrule *Powell v. Fernandez,* 2013 Ark. App. 595.

Historically, motions to extend the time for service were considered proper if filed within the time period provided by a previous extension. *See Dougherty v. Sullivan,* 318 Ark. 608, 887 S.W.2d 305 (1994); *see also Henyan v. Peek,* 359 Ark. 486, 199 S.W.3d 51 (2004); *Wilkins v. Food Plus, Inc.,* 99 Ark. App. 64, 257 S.W.3d 107 (2007). The Court of Appeals, however, held in *Powell* that a subsequent extension had to be sought within 120 days of the filing of the complaint.

Subdivision (k). This new provision reestablishes a substantial-compliance standard for process and service of process under Rule 4 when the defendant has actual notice of the complaint and has filed a timely answer. Other states have adopted similar rules. *E.g.,* Ore. R. Civ. P. 7(G).

Subdivision (k) is in accord with older Arkansas authority holding the plaintiff to a substantial-compliance standard, both as to the summons and service of process, in nondefault cases. *E.g., Ford Life Ins. Co. v. Parker,* 277 Ark. 516, 644 S.W.2d 239 (1982). More recent cases, however,

have held that a defendant's actual notice of a lawsuit does not validate defective process or defective service. *E.g., Trusclair v. McGowan Working Partners,* 2009 Ark. 203, 203 S.W.3d 428; *Carruth v. Design Interiors, Inc.,* 324 Ark. 373, 921 S.W.2d 944 (1996).

The strict-compliance standard reflected in these decisions grows out of default situations. *E.g., Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson v. Farris,* 263 Ark. 505, 565 S.W.2d 617 (1978). Despite the amendment of Ark. R. Civ. P. 55 to echo its federal counterpart, getting a default judgment set aside in Arkansas remains notoriously difficult. *E.g., McGraw v. Jones,* 367 Ark. 138, 238 S.W.3d 15 (2006). Insistence on strict compliance is a helpful shield in the default situation. But the same standard should not be a sword when the defect in process or service of process was minor and the defendant had actual notice of the complaint and filed a timely response.

It is often stated that service requirements, being in derogation of common-law rights, must be strictly construed and complied with exactly. *E.g., Trusclair,* 2009 Ark. 203, at 3, 203 S.W.3d at 430. This rule arose in the context of service on out-of-state defendants where "personal jurisdiction over a defendant may be founded on something less than actual notice." *Halliman v. Stiles*, 250 Ark. 249, 254, 464 S.W.2d 573, 577 (1971); *see generally Kerr v. Greenstein*, 213 Ark. 447, 212 S.W.2d 1 (1948) (construing nonresident motorist statute). When a defendant has actual notice of the complaint and does not default, however, due-process concerns are not present and the strict-compliance rule should not apply.

Application of the rule in nondefault situations is also at odds with the guiding principal of Rule 4—ensuring due process by giving the defendant adequate notice of the suit and an opportunity to respond before a judgment is entered. Subdivision (k) retains the strict-compliance rule in default situations, while reviving the substantial-compliance standard when the defendant has actual notice of a complaint and files a timely response. In the latter instance, due process is satisfied even if marginal defects in the summons or the service exist.

Subdivision (*l*). This new provision addresses a problem that has arisen primarily in divorce cases. It requires that a party who wishes to affirmatively waive sufficiency of process and sufficiency of service of process do so in writing, file the document with the clerk, and serve it on all parties. Otherwise, the waiver is not effective. This waiver goes only to these matters and does not, of itself, waive any other defense, such as lack of personal jurisdiction or improper venue.

Reporter's Notes (2021 Amendment). The need for an amendment to subsection 4(g)(1)(A)(ii) arose due to changes in United States Postal Service signature services during the COVID-19 pandemic. Prior to the amendment, Rule 4(g)(1)(A)(ii) required a "return receipt signed by the addressee or the agent of the addressee" for effective service by mail. However, postal service procedures during the pandemic did not permit addressees to sign the returned receipt. The rule as amended retained the signed green card return receipt as a basis for effective service by mail and added a provision that also validates service by mail if the green card "is executed as provided in the United States Postal Service procedures in place at the time of service."

HISTORY

Amended February 1, 1982; amended May 16, 1983; amended June 9, 1984, effective September 1, 1984; amended July 1, 1986, effective September 15, 1986; amended November 21, 1988, effective January 1, 1989; amended November 20, 1989, effective January 1, 1990; amended November 11, 1991, effective January 1, 1992; amended November 8, 1993, effective January 1, 1994; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended January 28, 1999; amended February 1, 2001; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended May 25, 2006; amended January 1, 2008; amended June 2, 2011, effective July 1, 2011 (form for summons and form for notice and acknowledgment); amended May 24, 2012, effective July 1, 2012, corrected by per curiam order August 14, 2012; amended March 13, 2014, effective July 1, 2014; amended June 21, 2018, effective January 1, 2019; amended and effective March 18, 2021.

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) *Service: When Required*. Except as otherwise provided in these rules, every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court] orders otherwise because of numerous parties. No service need be made upon parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4. Any pleading asserting new or additional claims for relief against any party who has appeared shall be served in accordance with subdivision (b) of this rule.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) *Service: How Made.*

> (1) Whenever under this rule or any statute service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney, except that service shall be upon the party if the court so orders or the action is one in which a final judgment has been entered and the court has continuing jurisdiction.
>
> (2) Except as provided in paragraph (3) of this subdivision, service upon the attorney or upon the party shall be made by delivering a copy to him or by sending it to him by regular mail or commercial delivery company at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy for purposes of this paragraph means handing it to the attorney or to the party; by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age. Service by mail is presumptively complete upon mailing, and service by commercial delivery company is presumptively complete upon depositing the papers with the company. When service is permitted upon an attorney, such service may be effected by electronic transmission, including e-mail, provided that the attorney being served has facilities within his or her office to receive and reproduce verbatim electronic transmissions. Service is complete upon transmission but is not effective if it does not reach the person to be served. Service by a commercial delivery company shall not be valid unless the company: (A) maintains permanent records of

actual delivery, and (B) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

(3) If a final judgment or decree has been entered and the court has continuing jurisdiction, service upon a party by mail or commercial delivery company shall comply with the requirements of Rule 4(G)(1) and (2), respectively.

(c) *Filing*. (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, proposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may but need not be filed unless ordered by the court. Depositions, interrogatories, requests for production or inspection, and answers and responses thereto shall not be filed unless ordered by the court. When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion and attached as an exhibit unless such documents have already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form. In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement for any pleading, paper, order, judgment, decree, or notice of appeal shall be satisfied when the document is filed with either the circuit clerk or the county clerk.

(2) Confidential information as defined and described in Sections III(A)(11) and VII(A) of Administrative Order 19 shall not be included as part of a case record unless the confidential information is necessary and relevant to the case. Section III(A)(2) of the Administrative Order defines a case record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding. If including confidential information in a case record is necessary and relevant to the case:

(A) The confidential information shall be redacted from the case record to which public access is granted pursuant to Section IV(A) of Administrative Order 19. The point in the case record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. If an entire document is redacted, then the name of the document (with the number of pages redacted specified) should be noted in the publicly available court file and the entire document should be filed under seal. The requirement that the redaction be indicated in case records shall not apply to court records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and

(B) An un-redacted copy of the case record with the confidential information included shall be filed with the court under seal. The un-redacted copy of the case record shall be retained by the court as part of the court record of the case. It is the responsibility of the attorney for a party represented by counsel and the responsibility of a party unrepresented by counsel to ensure that confidential information is omitted or redacted from all case records that they submit to a court.

It is the responsibility of the court, court agency, or clerk of court to ensure that confidential information is omitted or redacted from all case records, including orders, judgments, and decrees, that they create.

(3) If the clerk's office has a facsimile machine, the clerk shall accept facsimile transmissions of any paper filed under this rule and may charge a fee of $1.00 per page. Any signature appearing on a facsimile copy shall be presumed authentic until proven otherwise. The clerk shall stamp or otherwise mark a facsimile copy as filed on the date and time that it is received on the clerk's facsimile machine during the regular hours of the clerk's office or, if received outside those hours, at the time the office opens on the next business day.

(d) *Filing with the Judge*. The judge may permit papers or pleadings to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. If the judge permits filing by facsimile transmission, the provisions of subdivision (c)(2) of this rule shall apply.

(e) *Proof of Service*. Every pleading, paper or other document required by this rule to be served upon a party or his attorney, shall contain a statement by the party or attorney filing same that a copy thereof has been served in accordance with this rule, stating therein the date and method of service and, if by mail, the name and address of each person served.

Reporter's Notes (as modified by the Court) to Rule 5: -1: This Rule is essentially the same as FRCP 5 and makes no significant change in Arkansas law. With the obvious exception of ex parte proceedings, and conferring some discretion on the court in cases involving multiple parties, the Rule requires service of all pleadings, papers and other documents generated in the lawsuit on each of the other parties to the action.

2. FRCP 5(b) permits service in certain instances upon "some person of suitable age and discretion" residing in the residence or usual place of abode of the person to be served. As stated in the Reporter's Notes to Rule 4, the Committee has, in order to overcome the vagueness and uncertainty of that language, provided that in such an instance service may be had upon some person who is at least fourteen years of age.

3. FRCP 5(c) is omitted from the Rule because Section (a) adequately permits the trial judge to waive service where multiple parties are involved.

4. FRCP 5(e) permits the trial judge to accept the filing of pleadings and other papers personally. That procedure has been retained, because the clerk may not always be present.

5. Although FRCP 5 makes no provision for proof of service of pleadings, most Federal District courts require it by local rule, and it has been heretofore required in Arkansas courts. Rule 5(e) thus effects no change in that regard.

Additions to Reporter's Notes, 1984 Amendments: Rule 5(b) is amended to incorporate provisions from Ark. Stat. § Ann. 27-632 (Repl. 1979), which is now deemed superseded, making insufficient service of papers on an attorney in a case in which there has been a final order but reserved, continuing jurisdiction.

Rule 5(c) is amended to do away with the requirement that the papers mentioned be filed. Although discovery papers are among those which need no longer be filed, requests for admission and responses to requests for admission must be filed.

Additions to Reporter's Note, 1985 Amendment: The first sentence of Rule 5(a) is amended to make plain that all correspondence between counsel and the court is to be served upon all parties. As the Reporter's Note to the original version of this rule indicates, the phrase "every other paper" is to be given an expansive reading and includes "all pleadings, papers and other documents generated in the lawsuit..." Without intending to limit the breadth of the term, this amendment simply specifies by way of illustration a "paper" falling within the rule. Thus, the amended rule requires, for example, service of a precedent for judgment prepared at the court's request. *Compare Karam v. Halk*, 260 Ark. 3, 537 S.W.2d 797 (1976).

Addition to Reporter's Note, 1986 Amendment: The 1986 amendment adds the words "or any statute" following the word "rule" in the first sentence of subsection (b). The rule thus applies not only to those papers required to be filed by the Rules of Civil Procedure, but also to documents that must be filed under the provisions of particular statutes, e.g., Ark. Stat. Ann. § 34-2617 (Supp. 1985) (notice of intent to sue in medical malpractice proceedings).

Addition to Reporter's Note, 1989 Amendment: Rule 5(b) is amended to make clear that service upon an attorney under the rule is permitted by "fax" machine or by commercial delivery service, as well as by mail. This recognition of "new technology" is consistent with Act 58 of 1989 [16-20-109], which permits a court clerk to accept pleadings filed via fax machine.

Addition to Reporter's Note, 1990 Amendment: Subdivision (a) of Rule 5 requires that "pleadings asserting new or additional claims for relief against [parties in default for failure to appear] shall be served in the manner provided for service of summons in Rule 4." This provision implies that a pleading asserting a new or additional claim for relief against a party who has appeared in the action need only be served on the party's attorney, as set forth in Rule 5(b). Some federal courts have so construed the virtually identical federal rule. *E.g*., *Dysart v. Marriot Corp.*, 103 F.R.D. 15 (E.D. Pa. 1984). However, Arkansas cases predating adoption of the Rules of Civil Procedure indicate that service by summons on a party already before the court is required in some circumstances. *E.g*., *Nance v. Flaugh*, 221 Ark. 352, 253 S.W.2d 207 (1953); *Arbaugh v. West*, 127 Ark. 98, 192 S.W. 171 (1917). *See also Howard v. County Court*, 278 Ark. 117, 644 S.W.2d 256 (1983) (citing *Arbaugh* with approval but not discussing Rule 5).

To clarify Arkansas procedure, subdivision (a) of Rule 5 has been amended to provide that any pleading stating a new or additional claim for relief against a party who has appeared in the action may be served in the manner prescribed by subdivision (b). Consequently, such a pleading —e.g., a counterclaim, cross claim, or amended complaint stating a new claim for relief—may be served by mail on the party's attorney, and the methods for service of process set out in Rule 4 need not be employed. Service on the attorney in this context is consistent with the basic theory of Rule 5 that service of papers on the attorney, rather than the party, will expedite adjudication of the case and constitute sufficient notice to the party to comply with the requirements of due process. *See Adam v. Saenger*, 303 U.S. 59 (1938). If a party has not appeared, however, Rule 5(a) specifically provides that service must be made under Rule 4. Similarly, if the pleading seeks to add a new party—e.g., an answer asserting a counterclaim against the plaintiff and a

third person over whom the court has not previously acquired jurisdiction—the pleading must be served on the new party as provided by Rule 4. Because the plaintiff in that situation is already before the court, the pleading may be served on his attorney.

Addition to Reporter's Notes, 1993 Amendment: Rule 5(c) is amended by adding a new sentence providing that the clerk shall not refuse to accept any paper for filing solely because it is not presented in the proper form. Virtually identical language was added to Rule 5(e) of the Federal Rules of Civil Procedure in 1991. The amendment reflects the view that a judge, not the clerk, is the proper official to make determinations of this type. Moreover, a clerk's refusal to accept a document for filing exposes litigants to the hazards of time bars.

Addition to Reporter's Notes, 1997 Amendment: Subdivision (c) has been amended by designating the former text as paragraph (1) and by adding new paragraph (2), which addresses the filing of papers by facsimile. A statute adopted in 1989 provides that clerks may accept fax copies of pleadings but does not cover other papers that are filed. *See* Ark. Code Ann. § 16-20-109. Paragraph (2) tracks the language of the statute but applies to any paper filed under this rule. The new sentence added to subdivision (d) makes clear that the judge may permit papers filed with him to be transmitted by facsimile.

Addition to Reporter's Notes, 1999 Amendment: Subdivision (b) has been divided into three paragraphs, but only one change has been made. Previously, service by regular mail was sufficient in all cases. *See Office of Child Support v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997) (motion requesting judgment for unpaid child support). Paragraph (2) provides for service by regular mail as a general rule; however, paragraph (3) creates an exception by incorporating the requirements of Rule 4(d)(8)(A) for service by mail on a party when, as in *Ragland*, a final judgment or decree has been entered and the court has continuing jurisdiction. In this situation, paragraph (1) requires, as did the prior version of the rule, that service be made on the party, not his or her attorney. Ark. Code Ann. § 16-58-131, which addressed these issues and other matters now governed by Rules 4 and 5, has been deemed superseded.

Several changes have been made in subdivision (c)(2) concerning facsimile filings. The statute on which the rule was originally based, Ark. Code Ann. § 16-20-109, has been deemed superseded. The first sentence of subdivision (c)(2) has been amended to require any clerk with a facsimile machine to accept facsimile filings of any paper filed under this rule and to allow the clerk to charge a fee of $1.00 per page. Previously, the rule provided that a clerk with a facsimile machine "may accept" papers filed by fax. Apparently, some clerks refused to accept papers filed in this manner even though they had the necessary equipment. Also, language in the first sentence requiring that an original document be substituted for a fax filing if the latter were not made on bond-type paper has been deleted. This provision was considered unnecessary in light of improvements in the quality of fax machines. The third sentence of subdivision (c)(2) has been amended to require that the clerk stamp or otherwise mark the facsimile copy as filed on the date and time that it is received in the clerk's office or, if received when the office is closed, on the next business day. The last sentence of the prior version of the rule, which provided that "[t]he date and time printed by the clerk's facsimile machine on the transmitted copy shall be prima facie evidence of the date and time of filing," has been deleted because the date and time are printed by the sender's facsimile machine, not the clerk's.

Addition to Reporter's Notes, 2000 Amendment: Subdivision (c)(1) of the rule has been amended to provide that discovery materials, except for requests for admission, shall not be filed with the clerk unless the court so orders. This is the practice in the federal district courts in Arkansas and in several states. See Rule 5.5(f), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas; Rule 2-401 (d)(2), Md. R. Civ. P.; Rule 191.4, Tex. R. Civ. P. Under the prior version of the rule, the filing of such materials was optional absent a court order.

Addition to Reporter's Notes, 2002 Amendment: Since 1989, subdivision (b)(2) has allowed service of papers, other than the summons and complaint, on attorneys via commercial delivery companies. This subdivision has been amended to allow service by this method on parties as well, but with the safeguard that the commercial delivery company be court-approved. Section 1-2-122(b) of the Arkansas Code, which allowed service by "an alternative mail carrier, " has been deemed superseded.

Subdivision (b)(2) has also been revised to provide that "service by commercial delivery company is presumptively complete upon depositing the papers with the company." This provision parallels that for service by mail, which "is presumptively complete upon mailing." Subdivision (b)(3), which applies when the circuit court has continuing jurisdiction, has been amended to reflect the addition of new paragraph (C) of Rule 4(d)(8).

Addition to Reporter's Notes, 2005 Amendment: Rule 5(c)(1) has been amended. In some counties, the county clerk serves as the ex officio clerk of the probate division of the circuit court. Ark. Code Ann. § 14-14-502(b)(2)(B). Uncertainties have arisen in these circumstances about the effect of filing a pleading or paper with the wrong clerk. A sentence has been added to subsection (c)(1) to make plain that, in these counties, a party complies with Rule 5 when the document is file marked by either the circuit clerk or the county clerk. Similar clarifying language has been added to Rule of Civil Procedure 3(b) (filing a complaint), Administrative Order Number 2 (clerk's docket and filing), and Rule of Appellate Procedure–Civil 3(b) (filing a notice of appeal).

Addition to Reporter's Notes, 2008 Amendment: Subdivision (c) of the rule has been amended to incorporate Administrative Order 19's requirements, which grant the public broad access to case records while safeguarding confidential information in those records. (The Administrative Order is, appended to the Rules of Civil Procedure.) Amended Rule 5(c) obligates lawyers, and pro se litigants, to identify and shield confidential information that is necessary and relevant to the case by redacting that information in all publicly available documents they file with the court. The rule places primary responsibility for protecting information that the law has adjudged confidential on those individuals best situated to recognize and protect that information—lawyers and parties. They know the facts of their cases better than court staff or courts; they create almost all the documents coming into the court's record; and they have the greatest incentive to minimize and protect confidential information in case records.

Under subdivision 2(B), courts, court agencies, and clerks are responsible for omitting or redacting confidential information from case records—including orders, judgments, and decrees—that they create. A parallel change reflecting this obligation in judgments and decrees has been made in Rule of Civil Procedure 58.

Administrative Order 19 defines categories of confidential information and the Commentary to the Order explains the legal basis for the confidentiality. Section VII of the Order lists the following categories of confidential information in case records that are excluded from public access absent a court order allowing disclosure:

> (1) information excluded from public access pursuant to federal law;
>
> (2) information excluded from public access pursuant to the Arkansas Code Annotated;
>
> (3) information excluded from public access by order (including protective order) or rule of court;
>
> (4) Social Security numbers;
>
> (5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);
>
> (6) information about cases expunged or sealed pursuant to Ark. Code Ann.§ 16-90-901, et seq.;
>
> (7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies; and
>
> (8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

The Commentary to Section VII of Administrative Order 19 discusses confidential information protected from public disclosure under federal and Arkansas law. The Commentary includes a non-exhaustive list of Arkansas Code Annotated sections regarding confidentiality of records whose confidentiality may extend to the records even if they become court records. *See also* Arkansas Personal Information Protection Act, Ark. Code Ann. §§ 4-110-101, et seq.

New subsection (c)(2) embodies Order 19's important threshold requirement: only confidential information that is "necessary and relevant to the case" should be in a case record. Litigants are likewise best able to make this evaluation. And because they must redact any such information in a case record, litigants will have an incentive to reduce redactions by screening out unnecessary and irrelevant confidential information when creating documents for filing.

The amended rule provides two methods of redaction: blacking out the protected information or inserting a bracketed reference to the fact of redaction. Both achieve Administrative Order 19's balance between public access and confidentiality. If a redaction covers all of any multi-page document, then the rule requires listing the name of the document and the number of pages redacted in the publicly available court file. No useful purpose would be served by having a stack of blacked-out pages in the public file. Because a litigant will have deemed redacted information necessary and relevant, the court will need access to that information in handling and deciding the case. To allow this access, subdivision 2(B) obligates litigants to file unredacted copies of all their court papers under seal.

Some state agencies who deal routinely with confidential information—such as the Public Service Commission—have developed specialized rules for handling and protecting that information. Administrative Order 19 and its implementing rules in the Rules of Civil Procedure do not apply directly to those agencies' internal proceedings. But when a case from the PSC or other agency is appealed, the Rules of Appellate Procedure–Civil and the Rules of the Supreme Court and Court of Appeals do apply. Those Rules now implement Administrative Order 19 by incorporating and applying the redaction provisions of the Rules of Civil Procedure to all briefs, petitions, and other papers filed on appeal. Current agency procedures about confidential information that do not conflict with the new redaction rules are permissible. For example, confidential PSC documents are filed at the Commission on pink paper under seal. This and similar procedures supplement, but do not conflict with, the basic scheme required by Rule of Civil Procedure 5(c)(2). Certain appeal records will therefore contain materials shaped by these supplementary procedures, which is acceptable.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (b)(2) has been amended to clarify that service upon an attorney by "electronic transmission" includes service by e-mail. The amendment also provides that although service by electronic transmission is complete upon transmission, it is not effective if it does not reach the person to be served. As with other means of service, a claim that service by electronic transmission was not actually received may be raised by the person upon whom service was attempted. A corresponding amendment to Rule 6(d) adds the three-day additional response time allowed for service by mail or commercial delivery company to the time permitted for response to service by electronic transmission.

Addition to Reporter's Notes, 2022 Amendment: Subdivision 5(b)(3) is amended to reflect the 2019 amendment to Rule 4. The reference to prior Ark. R. Civ. P. 4(d)(A) and (b) is amended to refer to the current sections of Rule 4 governing service by mail and commercial delivery service.

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended June 24, 1985, effective September 1, 1985; amended July 7, 1986, effective September 15, 1986; amended November 20, 1989, effective January 1, 1990; amended December 10, 1990, effective February 1, 1991; amended November 8, 1993, effective January 1, 1994; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999; amended June 24, 1999; amended January 27, 2000; amended January 24, 2002; amended February 10, 2005; amended October 23, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010; amended October 6, 2022, effective November 1, 2022.

Rule 6. Time.

(a) *Computation*. In computing any period of time prescribed or allowed by these rules, by order of the Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed, in which event the period runs until the end of the next day that the clerk's office is open. When the period of time prescribed or allowed is less than fourteen (14) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation. As used in this rule and Rule 77(c), "legal holiday" means those days designated as a holiday by the President or Congress of the United States or designated by the laws of this State.

(b) *Enlargement*. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause, but it may not extend the time for taking an action under Rules 4(i), 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) *For Motions, Responses, and Replies*. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 20 days before the time specified for the hearing. Any party opposing a motion shall serve a response within 10 days after service of the motion. The movant shall then have 5 days after service of the response within which to serve a reply. The time periods set forth in this subdivision may be modified by order of the court and do not apply when a different period is fixed by these rules, including Rules 56(c) and 59(d).

(d) *Additional Time After Service by Mail or Commercial Delivery Company*. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, commercial delivery company, or electronic transmission, including e-mail pursuant to Rule 5(b)(2), three (3) days shall be added to the prescribed period. Provided, however, that this subdivision shall not extend the time in which the defendant must file an answer or pre-answer motion when service of the summons and complaint is by mail or commercial delivery company in accordance with Rule 4.

Reporter's Notes to Rule 6: 1. This Rule is practically identical to FRCP 6. Section (a) has been changed somewhat by omitting a recitation of specific legal holidays within the definition of legal holiday. It is redundant to list specifically the holidays and then add to the list "any other day appointed as a holiday by the President of [or] the Congress" or by the State.

2. This Rule does not substantially change previous Arkansas practice. As before, trial judges are given broad discretion in most instances to extend the various periods of time within which certain actions must be taken. The exceptions are noted in Section (b).

Addition to Reporter's Note, 1986 Amendment: Rule 6(a) is amended, consistently with the federal rule, to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the former version of the rule, parties bringing motions under rules with 10-day periods could have as few as five working days to prepare their motions.

Addition to Reporter's Notes, 1988 Amendment: Rule 6(d) is amended to make plain that a defendant does not have an extra three days to file an answer or preanswer motion under Rule 12 when the summons and complaint are served by mail pursuant to Rule 4. Allowing a defendant an additional three days to answer in the event of service by mail would be a "bonus" not available to a defendant served by another method. Under Rule 12(a), a defendant must answer

or file a preanswer motion within a given number of days "after the service of summons and complaint upon him." The specified time period thus begins to run when the defendant receives the summons and complaint, irrespective of the manner in which it is served. Rule 6(d) continues to apply with respect to pleadings and papers other than the complaint, however, for service of these materials by mail is presumptively complete upon mailing, Rule 5(b), Ark. R. Civ. P. Thus, the three-day extension provided by Rule 6(d) is necessary to compensate for the "lag time" between the mailing of these papers and their delivery.

Addition to Reporter's Note, 1990 Amendment: Rule 6(b) is amended to correspond to the changes made in Rule 55 regarding default judgments. Under revised subdivision (b)(2), the court may, upon motion, extend the time for filing an answer (or for other action) after the relevant period has expired if the failure was the result of "mistake, inadvertence, surprise, excusable neglect, or other just cause." This standard, which mirrors that employed in Rule 55(c)(1) with respect to the setting aside of a default judgment, is intended to liberalize Arkansas practice. Under former Rule 6(b), an extension of time was permissible only where the failure to act was the result of "excusable neglect, unavoidable casualty or other just cause."

Addition to Reporter's Notes, 2000 Amendment: The time period in the third sentence of subdivision (a) has been changed from eleven days to fourteen days, the intent being to eliminate confusion in the computation of response time when a motion has been served by mail under subdivision (d).

Addition to Reporter's Notes, 2002 Amendment: Rule 6(c) has been amended to clarify the timing of motions, responses, and replies. A related change with respect to motion practice has been made in Rule 7(b), which governs the form and content of motions, responses, and replies. Cross-references to Rules 6(c) and 7(b) have been added to Rule 12(i) and Rule 78(b).

Under the prior version of subdivision (c), a written motion and notice of hearing had to be served no later than ten days prior to the date set for hearing. At the same time, Rule 78(b) provided a ten-day period for a response and a five-day period for reply. As a result, there might be no time for a reply. To address this problem, the ten-day period in subdivision (c) has been expanded to twenty days. Also, the provisions governing the timing of responses and replies have been shifted from Rule 78(b) to subdivision (c). As was previously the case, the court may modify the time periods by order. These periods are inapplicable when a different time frame is established by another rule, e.g., Rule 56(c) (motions for summary judgment).

The provision in the former version of subdivision (c) as to supporting affidavits now appears in Rule 7(b)(2).

Addition to Reporter's Notes, 2003 Amendment: Subdivision (a) has been amended to address the situation in which the clerk's office is closed for reasons other than weekends and legal holidays. The amendment incorporates the Supreme Court's holding in *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002), and makes Rule 6(a) consistent with, though not identical to, its federal counterpart.

Subdivision (d) of the rule has been rewritten to include commercial delivery companies. The amended subdivision applies when service of papers, other than the summons and complaint, is by mail or by commercial delivery company.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (b) of the rule has been amended by adding Ark. R. Civ. P. 4(i) to the list of exceptions, thereby codifying the holding in *Smith v. Sidney Moncrief Pontiac*, No. 02 449 (June 19, 2003).

Addition to Reporter's Notes, 2010 Amendment: Subdivision (d) has been amended to add the three-day additional response time allowed for service by mail or commercial delivery company to the time permitted for response to service by electronic transmission, including by e-mail, under Rule 5(b)(2).

HISTORY

Amended July 7, 1986, effective September 15, 1986; amended November 21, 1988, effective January 1, 1989; amended December 10, 1990, effective February 1, 1991; amended November 11, 1991, effective January 1, 1992; amended January 27, 2000; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004.

Rule 7. Pleadings and Motions.

(a) *Pleadings Allowed*. There shall be a complaint and an answer; a counterclaim; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed.

(b) *Motions and Other Papers*.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) All motions required to be in writing and any responses and replies shall include a brief supporting statement of the factual and legal basis for the motion, response, or reply and the citations relied upon. Any supporting affidavits shall be served with the motion, response, or reply. Failure to satisfy these requirements shall be ground for the court's striking the motion, response, or reply. The court is not required to grant a motion solely because no response or brief has been filed.

(3) The rules applicable to captions, signings, and other matters of form of pleadings by Rules 10(a) and 11(a) apply to all motions and other papers provided for by these rules.

(4) The procedure for submitting a potentially dispositive motion to the circuit court for decision, both with and without a hearing, is outlined in Administrative Order Number 3(2)(B).

(c) *Demurrers, Pleas, etc., Abolished*. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

(d) *Copies of Pleadings and Motions*. One additional copy of all pleadings and motions shall be filed by a party or his attorney for the use of the court.

COMMENT

Reporter's Notes to Rule 7:

1. This Rule serves the purpose of FRCP 7 by providing a simple and elastic pleading and motion procedure, placing minimum emphasis on form and reducing the number of pleadings allowed. *Roughley v. Penn. R. R. Co*., 230 F.2d 387 (3rd Cir. 1956).

2. With minor exceptions Section (b) is the same as FRCP 7(b). Although the superseded Ark. Stat. Ann. § 27-1103 (Repl. 1962) did not provide for pleadings other than complaint, demurrer or answer and demurrer or reply to the answer, other now superseded statutes recognized the validity of counterclaims and replies thereto as well as cross complaints. All pleadings recognized herein have been a part of Arkansas practice.

3. As in FRCP 7, Section (b) requires a reply to a counterclaim only when it is "denominated as such." No reply is required to a set-off or to a counterclaim which is not so denominated. Thus, by failure to reply, a plaintiff does not lose the right to defend against new matters set out in the answer unless the answer, or a part of it, is denominated "counterclaim." *Gulf Refining Co. v. Fetschan*, 130 F.2d 129 (6th Cir. 1942), *cert, den*., 318 U.S. 764, 63 S. Ct. 666. Indeed, a reply to an answer not containing a counterclaim denominated as such should not be considered by the court. *See Carpenter v. Rohm & Hass*, 170 F.2d 146 (3d Cir. 1948); *Kramer v. Jarvis*, 81 F. Supp. 360 (D. C. Neb. 1948).

4. FRCP 7(a) provides that the court may order a reply to an answer or a third party answer. That provision is omitted from the Rule because its theoretical necessity is questionable and its practical value is very little. A reason given for this FRCP provision is that it may enable the defendant to determine whether the plaintiff will admit to new matters raised in the answer but not denominated as a counterclaim. The same goal can be accomplished through discovery. Other reasons for the FRCP provision are stated in Wright and Miller, *Federal Practice and Procedure*, 1185 (1969), but none of them seems sufficient to justify its inclusion here. In the leading case on whether the court should, pursuant to FRCP 7(a), order a reply to an answer, the court held that such a reply should not be ordered unless there is a "clear and convincing factual showing of necessity or other extraordinary circumstances of a compelling nature," and that a reply should not be used as a substitute for discovery or inspection or for a pre-trial hearing. *Moire Color, Ltd. v. Eastman Kodak Co*., 24 F.R.D. 325 (D.C. N.Y. 1959). Prior Arkansas law permitted no reply except in response to allegations containing a counterclaim or set-off. As noted above, no reply is required or permitted to a set-off under this Rule.

5. The purpose of Section 6(1), which is the same as FRCP 7(b)(1), is to give written notice to other parties of motions not made in the course of a hearing or trial. Oral motions made during a hearing or trial are still permitted as they are usually reduced to writing in the record of the proceedings, and they remain necessary, due to the unpredictable nature of litigation.

6. Section (b)(2) requires that matters as to form of pleadings are applicable to motions and other documents. The evident reason is to avoid the unnecessary complication resulting from different formulary rules.

7. Perhaps the most notable effect of Rule 7 is its abolition of the demurrer from Arkansas procedure. It was abolished in the FRCP and the old Federal Equity Rules and elsewhere for avoiding its sheer technicality and to permit more liberal tools for attacking the sufficiency of pleadings which accomplish the legitimate purposes of the demurrer, e.g., Rule 12(b)(6).

8. Section (d) continues the practice prescribed in superseded Rule 1(c) of the Uniform Rules for Circuit and Chancery Courts which required an additional copy of all pleadings and motions for use of the court.

Addition to Reporter's Notes, 2002 Amendment: New paragraph (2) of subdivision (b) addresses matters that previously appeared in Rule 6(c) (supporting affidavits) and Rule 78(b) (content of motions). With these changes, Rule 6(c) governs the timing of motions, responses, and replies, while Rule 7(b) governs their content. Rule 78(b) simply cross-references these provisions. Former paragraph (2) of subdivision (b) has been redesignated as paragraph (3), and minor changes have been made in the titles of subdivision (b) and the rule.

Addition to Reporter's Notes, 2007 Amendment: New paragraph (4) of subdivision (b) references the 2007 changes in Administrative Order 3, which clarify when a matter is submitted for decision for purposes of that Order.

Reporter's Notes (2018 Amendment): Rule 7(b)(3) has been amended to make clear that the requirements of rules 10(a) and 11(a) in regard to captions, signings, and other matters of the form of pleadings also apply to motions and other papers allowed under the rules.

HISTORY

Amended January 24, 2002; amended June 21, 2018, effective September 1, 2018.

Rule 8. General Rules of Pleading.

(a) *Claims for Relief*. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim, or third party claim, shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled. In claims for unliquidated damage, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount. Relief in the alternative may be demanded.

(b) *Defenses: Form of Denials*. A party shall state in ordinary and concise language his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a

qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the claim, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments, except such designated averments or paragraphs as he expressly admits, provided that he may admit any part thereof and deny the remainder. When the pleader intends in good faith to controvert all averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses*. In responding to a complaint, counterclaim, cross-claim or third party claim, a party shall set forth affirmatively accord and satisfaction, arbitration and award, comparative fault, discharge in bankruptcy, duress, estoppel, exclusiveness of remedy under workmen's compensation law, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, set-off, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of Failure to Deny*. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied, either generally or specifically, in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to Be Concise and Direct*: *Consistency.*

> (1) Each averment of a pleading shall be direct and stated in ordinary and concise language. No technical forms of pleadings or motions are required.
>
> (2) When permitted by Rule 18, a party may set forth two or more separate claims, provided that each claim shall be set forth in separate, numbered counts. A party shall set forth in an answer or reply as many defenses, whether legal or equitable, as he may have. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings*. All pleadings shall be liberally construed so as to do substantial justice.

Reporter's Notes to Rule 8: 1. Although reworded, Rule 8 is substantially the same as FRCP 8. It seeks to accomplish the same purpose as FRCP 8, i.e. to require that pleadings be drafted in such a manner as to give a party fair notice of what the claim is and the grounds upon which it is based. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

2. Section (a) requires that all claims for relief contain three basic elements, one of which a statement upon which venue and jurisdiction are based which requirement was not found under superseded Ark. Stat. Ann. § 27-1113 (Repl. 1962). Section (a)(1) and (2) substitutes the term "ordinary and concise" language from this superseded statute for the term "short and plain" found in the Federal Rule.

3. Section (a)(3) tracks superseded Ark. Stat. Ann. § 27-1113 (4) (Supp. 1975) relative to claims for unliquidated damages. The obvious purpose of this section is to prevent a plaintiff from using unliquidated demands to avoid removal of diversity of citizenship cases to federal court.

4. Section (b) follows FRCP 8(b). The theory behind this section is that an answer or reply should apprise a claimant which allegations in the claim are admitted and not in issue and which are contested and thus require proof. *Mitchell v. Wright*, 154 F. 2d 924 (C.C.A. 5th, 1946). In the first sentence of Section (b), the term "ordinary and concise" is substituted for the term "short and plain" used in the Federal Rule.

5. Section (b) permits a pleader to allege that he is without knowledge or information sufficient to form a belief as to the truth of an averment and thereby deny such allegation. This follows superseded Ark. Stat. Ann. § 27-1121 (2) (Repl. 1962). In doing so, however, the pleader must act in good faith or risk having his pleading stricken under Rule 12(f). Section (b) also requires that the pleader fairly meet the substance of the averment denied. The purpose of this provision is to proscribe a pleading which neither admits nor denies, but simply demands proof of claimant's allegations. Such an allegation or averment is not sufficient to constitute a denial. Reed v. Hickey, 2 F.R.D. 92 (D.C., 1941). Section (b) also follows the Federal Rule by allowing a pleader to admit certain allegations while denying others, and by permitting the use of general denials, although their use is discouraged under federal practice. One asserting a general denial is required to act in good faith in doing so.

6. Section (c) follows in substance FRCP 8(c). The list of affirmative defenses contained in this section is not intended to be exclusive and other defenses may be asserted, if available, even though not specifically listed. The last sentence of this section grants the court discretion to allow a counterclaim or affirmative defense even though improperly designated.

7. Section (d) is essentially the same as FRCP 8(d) and superseded Ark. Stat. Ann. §§ 27-1151 and 27-1121 (Repl. 1962) concerning general denials.

8. Section (e)(1) is designed to avoid verbosity in pleadings. It is a slightly reworded version of FRCP 8(e)(1). Technical rules or forms of pleadings or motions are abolished. Also, this section follows superseded Ark. Stat. Ann. § 27-1121 (Repl. 1962) in requiring separate defenses to be set out in separate, numbered paragraphs.

9. Section (f) follows superseded Ark. Stat. Ann. § 27-1150 (Repl. 1962) by requiring that all pleadings be liberally construed so as to do substantial justice.

Addition to Reporter's Notes, 1983 Amendment: Rule 8(a) is amended to remove the requirement of pleading grounds of jurisdiction and venue.

The original Reporter's Notes were meant to apply to the committee draft of Rule 8(a) and not to the rule as revised by the Supreme Court. In *Harvey v. Eastman Kodak Co.*, 261 Ark. 783, 610 S.W.2d 582 (1981), the Supreme Court made clear its intention that Arkansas had not become a "notice pleading" jurisdiction in the image of the federal system. *See* Faculty Note, 34 Ark. L. Rev. 722 (1981).

Addition to Reporter's Notes, 1992 Amendment: Rule 8(a) is amended to require that the complaint and other pleadings that set forth claims for relief include facts showing that the court has jurisdiction and that venue is proper. This requirement is consistent with statements in the case law regarding personal and subject matter jurisdiction. *E.g*., *Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992) (personal jurisdiction is to be determined on the basis of facts alleged in the complaint); *Hesser v. Johns*, 288 Ark. 264, 704 S.W.2d 165 (1986) (question of whether court has jurisdiction over the subject matter is determined from allegations in the complaint). Moreover, the Supreme Court has recognized that a complaint may on its face reveal that venue is improper. *E.g., Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co*., 246 Ark. 101, 437 S.W.2d 459 (1969). Nonetheless, some confusion arose in light of the 1983 amendment of Rule 8(a) deleting a requirement, found in the original version of the rule, that the complaint contain a statement of "the grounds upon which venue and the court's jurisdiction depend." However, elimination of the requirement that grounds be pleaded was apparently not intended to modify the role of the factual allegations in the determination of jurisdiction and venue. The 1992 amendment, which is designed to clarify the obligations of the pleader as to jurisdiction and venue, is consistent with the requirement that a complaint allege facts constituting a cause of action. *See Harvey v. Eastman Kodak Co*., 271 Ark. 783, 610 S.W.2d 582 (1981).

HISTORY

Amended May 16, 1983; amended December 14, 1992.

Rule 9. Pleading Special Matters.

(a) *Capacity*. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, Mistake, Condition of the Mind*. In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge and other condition [conditions] of mind of a person, may be averred generally.

(c) *Conditions Precedent*. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official Document or Act*. In pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment*. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) *Time and Place*. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special Damage*. When items of special damage are claimed, they shall be specifically stated.

(h) *Allocation of Nonparty Fault; Notice*. (1) In an action for personal injury, medical injury, wrongful death, or property damage, a defending party seeking to allocate fault to a nonparty pursuant to Ark. Code Ann. § 16-61-202(c) shall give notice s provided in paragraph (2) of this subdivision. This requirement does not apply with respect to a nonparty who has entered into a settlement agreement with the claimant.

> (2) Notice shall be given in the initial responsive pleading, if the factual and legal basis upon which fault can be allocated is then known, or in an amended pleading pursuant to Rule 15 after the party discovers that information. The pleading shall:
>
> > (A) sufficiently identify the nonparty to permit service of process, regardless whether service can be made or the court has in personam jurisdiction over the nonparty; and
> >
> > (B) state in ordinary and concise language facts showing that the nonparty is at fault for the personal injury, medical injury, wrongful death, or property damage alleged by the claimant.
>
> (3) A party served with a pleading that identifies a nonparty pursuant to this subdivision may, within 30 days after service, file an amended pleading pursuant to Rule 15 stating a claim against the nonparty.
>
> (4) A party may not seek to allocate fault to a nonparty pursuant to Rules 49(c) or 52(a)(2) except by compliance with this subdivision (h). This subdivision does not prohibit a party from introducing evidence on any issue.

COMMENT

Reporter's Notes to Rule 9: 1. With certain exceptions, Rule 9 substantially follows FRCP 9. Few changes in Arkansas law are effected by this rule. Section (a) requires that any party desiring to raise an issue as to the capacity or authority of a party do so by specific, negative averment. This is closely akin to superseded Ark. Stat. Ann. § 27-1121 (2) (Repl. 1962) which provided that an allegation as to the status of a party was taken as admitted unless specifically denied. While lack of authority or capacity is not treated as an affirmative defense under the Federal Rule, it is analogous to an affirmative defense in that the objection is waived unless specifically asserted. *Summers v. Interstate Tractor & Equipment Co.,* 446 F. 2d 42 (C.C.A. 9th, 1972); *Carver v. Hooker,* 369 F. Supp. 204 (D.C., N.H., 1973).

2. Omitted in Section (a) is the provision found in FRCP 9(a) which requires that capacity or status of a party be alleged when required to show the court's jurisdiction. This provision does

not appear to be necessary under Arkansas practice, particularly in view of Rule 8(a)(1) which requires a statement of the grounds upon which venue and jurisdiction depend.

3. Section (b) adds the requirement not found in FRCP 9(b) that duress or undue influence be plead with particularity. This is in keeping with prior Arkansas law. *Jansen v. Blissenbach,* 210 Ark. 22, 193 S.W.2d 814(1946); *Ledwidge v. Taylor,* 200 Ark. 447, 139 S.W.2d 238(1940).

4. Section (c) is generally in accord with prior Arkansas law. Superseded Ark. Stat. Ann. § 27-1147 (Repl. 1962) required that in pleading the performance of a condition precedent in a contract, a party need only state generally that he had performed all conditions on his part. This rule is broader in scope and applies to all actions, whether contractual or not. It should have the effect of removing such requirements as pleading notice of breach of warranty as a condition precedent to maintaining such a claim. *L.A. Green Seed Co. of Arkansas v. Williams,* 246 Ark. 463, 438 S.W.2d 717(1969).

5. Section (e) is essentially the same as superseded Ark. Stat. Ann. § 27-1146 (Repl. 1962) and does not affect any changes in Arkansas law.

6. Section (f) provides that the allegations as to time and place are material as opposed to the old common law rule which treated them as immaterial and thus subject to variance at the trial. The purpose of this provision is to enable a party to raise such defenses as statute of limitations and laches based upon dates alleged by the opposing party. See Wright & Miller, *Federal Practice & Procedure,* Section 1308. In short, a party is bound by the dates and places alleged in his pleadings.

7. Section (g) follows the common law rule that special damages must be pleaded specifically. Arkansas has recognized this rule, but has not always adhered to it. *Arkansas Power & Light Co. v. Harper,* 249 Ark. 606, 460 S.W.2d 75 (1970); *Ark-La Gas Co. v. McGaughey Bros., Inc.,* 250 Ark. 1083, 468 S.W.2d 754(1971).

8. Omitted from Rule 9 is Section (h) of FRCP 9 which deals with admiralty and maritime claims under federal law.

Addition to Reporter's Notes (2014 amendment): New subdivision (h) creates the exclusive procedural mechanism for asserting the right to an allocation of nonparty fault created by Ark. Code Ann. § 16-61-202(c), as amended by Act 1116 of 2013, § 3, or by any other statute. Other states have placed similar provisions in their rules that govern the pleading of special matters. *E.g.,* Mich. Ct. Rule 2.112(k); Utah R. Civ. P. 9(*l*). Subdivision (h) draws in part on those rules and on section 2 of Act 649 of 2003, codified at Ark. Code Ann. § 16-55-202, which was held unconstitutional on separation-of-powers grounds in *Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, 308 S.W.3d 135.

Under subdivision (h), a defendant asserts a contribution claim for allocation of nonparty fault in an answer or amended answer. By contrast, a defendant seeking contribution for damages may bring a third-party claim against a nonparty under Rule 14 or a cross-claim against a co-party under Rule 13. The procedural section of the Uniform Contribution Among Tortfeasors Act, Ark. Code Ann. § 16-61-207, is inconsistent with Rule 9(h) and in some respects with Rules 13 and 14. Therefore, section 16-61-207 is superseded pursuant to Ark. Code Ann. § 16-11-301.

Notice under Rule 9(h) is necessary if a nonparty's fault is to be considered by the trier of fact. See 2014 Amendments to Rules 49 and 52. Under paragraph (h)(1), however, the notice requirement does not apply if a nonparty has settled with the claimant. When there has been a settlement, there is no need for notice in light of Ark. Code Ann. § 16-61-204(d), which provides that "the remaining defendants are entitled to a determination by the finder of fact of the released joint tortfeasor's pro rata share of responsibility for the injured person's damages."

Under paragraph (h)(2), noticed must be given in the defending party's original responsive pleading, if the necessary information is then available, or in an amended or supplemental pleading under Rule 15. Unlike former section 16-55-202, under which notice could be given no later than 120 days before the trial date, paragraph (h)(2) contains no deadline. Although Rule 15 allows amended and supplemental pleadings as a matter of right, the court may, on motion, strike the amended or supplemental pleading or grant a continuance if it determines that "prejudice would result or the disposition of the cause would be unduly delayed."

Paragraph (h)(2)(A) requires that nonparties be identified in sufficient detail to permit service of process, even though service cannot be made and the court lacks in personam jurisdiction. This requirement guards against the practice of naming so-called "phantom tortfeasors." *See Brown v. Wal-Mart Discount Cities,* 12 S.W.3d 785 (Tenn. 2009). Paragraph (2)(B) parallels Ark. R. Civ. P. 8(a) in requiring the same fact pleading necessary in a complaint. The requirement in former section 16-55-202—"a brief statement of the basis for believing the nonparty to be at fault"—was uncertain in scope but well short of the fact-pleading standard.

Paragraph (h)(3) permits any party, within 30 days after being served with a pleading that identifies a nonparty, to amend his or her pleadings to assert a claim against the nonparty. Paragraph (h)(4) makes plain that the procedure set out in subdivision (h) is the exclusive method for allocation of nonparty fault under Rules 49(c) and 52(a)(2). It also emphasizes, as should be clear from the context, that subdivision (h) has nothing whatsoever to do with the admissibility of evidence. For example, defense counsel remain free to introduce evidence of proximate causation with respect to a nonparty in the course of raising the so-called "empty chair" defense.

HISTORY

Amended by per curiam order August 7, 2014, effective January 1, 2015.

Rule 10. Form of Pleadings.

(a) *Caption; Names of Parties; Contact information*. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number and a designation as in Rule 7(a). In the complaint, the title of the action shall include the names of all the parties, but in other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. To the extent the following information is available, all pleadings shall contain the name, bar number, mailing address, telephone number, fax number and email address of the attorney signing the pleading, or of the party if self-represented.

(b) *Paragraphs; Separate Statements*. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits*. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) *Required Exhibits*. A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading.

COMMENT

Reporter's Notes to Rule 10:

1. Section (a) of Rule 10 is identical to FRCP 10(a) and generally follows prior Arkansas law. Superseded Ark. Stat. Ann. § 27-1113 (Repl. 1962) dealt with captions in complaints and superseded Ark. Stat. Ann. § 27-1121 (Repl. 1962) dealt with captions in answers. Also, the use of only one plaintiff, defendant or other party when there are multiple parties was previously permitted by superseded Ark. Stat. Ann. § 27-1121 (1) (Repl. 1962).

2. Section (b) is identical to FRCP 10(b) with the exception of the omission of the phrase "whenever a separation facilitates the clear presentation of the matters set forth" found in the second sentence. This rule makes it mandatory that each claim founded upon a separate transaction or occurrence and each defense other [than] denials be stated in separate counts or defenses. This is consistent with the requirements contained in superseded Ark. Stat. Ann. § 27-1114 (Repl. 1962) and superseded Ark. Stat. Ann. § 27-1121 (4) (Repl. 1962).

3. The purpose of Section (c) is to permit the incorporation by reference of prior allegations and thus encourage short and concise pleadings.

4. Section (d) marks a deviation from FRCP 10 in that the attachment of exhibits is here made mandatory unless good cause is stated in the pleading to justify their absence. This provision is similar to superseded Ark. Stat. Ann. § 27-1144 (Repl. 1962), except there is no requirement here that the best evidence of a written instrument be filed in the absence of the original. No attempt has been made by the Committee to define good cause which justifies the failure to attach an exhibit to a pleading; instead, the courts are given the discretion to make such determination. It is the intent, however, that exhibits should be attached to pleadings in all but exceptional cases.

Reporter's Notes (2018 Amendment): Rule 10(a) was amended by adding a new final sentence specifying that to the extent the information is available, all pleadings are to contain the name, bar number, mailing address, telephone number, fax number and email address of the attorney or the self-represented party signing the pleading. The rule does not apply to information the attorney or self-represented party may not have, for example a fac number, email

address, or ar number (self-represented). The same information requirement also applies to motions and other papers. See Ark. R. Civ. P. 7(b)(3).

HISTORY

Amended June 21, 2018, effective September 1, 2018.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

(a) *Signature.* Except as provided in Rule 87 of these rules, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his or her individual name. A self-represented person shall sign his or her pleading, motion, or other paper. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(b) *Certificate.* The signature of an attorney or party constitutes a certificate by the signatory that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support;

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information;

(5) when a party's claim or affirmative defense may only be established in whole or in part by expert testimony, the party has consulted with at least one expert, or has learned in discovery of the opinion of at least one expert, who (i) is believed to be competent under Ark. R. Evid. 702 to express an opinion in the action and (ii) concludes on the basis of the available information that there is a reasonable basis to assert the claim or affirmative defense; and

(6) the pleading, motion, or other paper complies with the requirements of Rule 5(c)(2) regarding redaction of confidential information from case records submitted to the court.

(c) *Sanctions.* (1) If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon any attorney or party who violated this rule an appropriate sanction.

(2) Sanctions that may be imposed for violations of this rule include, but are not limited to:

(A) an order dismissing a claim or action;

(B) an order striking a pleading or motion;

(C) an order entering judgment by default;

(D) an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee;

(E) an order to pay a penalty to the court;

(F) an order awarding damages attributable to the delay or misconduct;

(G) an order referring an attorney to the Supreme Court Committee on Professional Conduct or the appropriate disciplinary body of another state.

(3) The court's order imposing a sanction shall describe the sanctioned conduct and explain the basis for the sanction. If a monetary sanction is imposed, the order shall explain how it was determined.

(4) The court shall not impose a monetary sanction against a represented party for violating subdivision (b)(2), on its own initiative, unless it issued the show-cause order under subdivision (c)(6) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(5) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(6) On its own initiative, the court may order an attorney or party to show cause why conduct specifically described in the order has not violated subdivision (b). The order shall afford the attorney or party a reasonable time to respond, but not less than 14 days.

COMMENT

Reporter's Notes to Rule 11: 1. With minor changes, Rule 11 is substantially identical to FRCP 11. Omitted from Rule 11 is the provision in the Federal Rule which abolished the old equity rule as to quantum of proof required where an answer is under oath. Arkansas has not followed this rule; therefore, there is no need to have a provision which abolished it.

2. Superseded Ark. Stat. Ann. § 27-1105 (Repl. 1962) required that a complaint, answer and reply be verified. Under Rule 11, only those few pleadings and motions specifically required by these rules to be verified need be verified. Under this and the Federal Rule, verification of pleadings is the exception and not the rule.

3. Under FRCP 11, the signature of an attorney to a pleading amounts to an affirmation that he believes the pleading to have merit. *Russo v. Sofia Bros., Inc*., 2 F.R.D. 1 (D.C. N.Y., 1941). It is a breach of an attorney's duty to file pleadings which create issues that counsel does not believe to have basis in fact. *Arena v. Luckenbach Steamship Co.,* 279 F.2d 186 (C.C.A. 1 st, 1960).

4. Omitted from Rule 11 are the words "as sham and false" found in FRCP 11. These words do not add any particular import to the rule, hence their omission. Also, the word "served" as used in FRCP 11 has been deleted and the word "filed" substituted therefor.

Addition to Reporter's Note, 1986 Amendment: Rule 11 has been completely rewritten. It is now substantially identical to Federal Rule 11, as amended in 1983. As adopted in 1979, Arkansas Rule 11 was virtually identical to its federal counterpart, providing for the striking of pleadings and imposition of disciplinary sanctions to check abuses in the signing of pleadings. Experience under original Rule 11 in the federal courts demonstrated that the rule was not effective in deterring abuses, and confusion existed as to the circumstances that could trigger striking a pleading or taking disciplinary action, the standard of conduct expected of attorneys who sign pleadings and other papers, and the range of available sanctions. The amended rule is intended to reduce the reluctance of the courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

As amended, Rule 11 expressly applied to pleadings, motions, and other papers. It therefore includes discovery requests, discovery motions, and any other paper that must be filed and served under Rule 5, Ark. R. Civ. P. Moreover, amended Rule 11 provides that, in addition to disciplinary sanctions, the trial judge may impose other sanctions upon an offending attorney, including a reasonable attorney's fee for the opposing party. The assessment of attorney's fees for violation of procedural rules is currently found in other Rules of Civil Procedure, e.g., Rules 37(a)–(d), 56(g), and 26(b) & (c).

Amended Rule 11 states that the signature of an attorney constitutes a certificate by him "that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." This language is substantially stronger than in the former rule. In addition, the recently adopted Arkansas Rules of Professional Conduct emphasize that a lawyer may not ethically bring or defend a proceeding or an issue unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. See Rule 3.1, Arkansas Rules of Professional Conduct.

Under the former version of Rule 11, the signature of an attorney certified that the suit or motion was not interposed for purposes of delay. The new rule is broader in stating that the pleading, motion or other paper "is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This provision is consistent with the newly adopted ethical rules. For example, Rule 3.2 of the Arkansas Rules of Professional

Conduct provides that a lawyer "shall make reasonable efforts to expedite litigation consistent with the interest of the client."

Addition to Reporter's Notes, 1997 Amendment: The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based [on] Rule 11(c) (1) of the Federal Rules of Civil Procedure, as amended in 1993. In addition, the second sentence of subdivision (a) has been revised to require a party not represented by counsel to provide his telephone number, if any, along with his address. New subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served. If the alleged violation is corrected during this period, the motion should not be filed with the court. This provision is intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

To emphasize the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the new subdivision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a letter or telephone call, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Addition to Reporter's Notes, 2008 Amendment: Subdivision (a) has been amended by adding a new element to the certifications made by a pro se party or an attorney when that person signs a pleading, motion, or other paper. The attorney or party is now also certifying compliance with Administrative Order 19's mandate for redaction of necessary and relevant confidential information in the case record being filed. The incorporation of Administrative Order 19's mandate here gives the circuit court a ready method for enforcing this mandate.

Addition to Reporter's Notes (2015 amendment): The amendment reorganizes and clarifies the rule. Several revisions are based on language in Ark. R. App. P.-Civ. 11, which applies when frivolous appeals are taken or other misconduct occurs at the appellate level. Other changes are based on Fed. R. Civ. P. 11, but overall this rule differs significantly from its federal counterpart.

With the adoption of these revisions, section 21 of the Civil Justice Reform Act of 2003, codified at Ark. Code Ann. § 16-114-209, is superseded pursuant to Ark. Code Ann. § 16-11-301. The Supreme Court invalidated a portion of the statute in *Summerville v. Thrower,* 369 Ark. 231, 253 S.W.3d 415(2007).

Subdivision (b) of the revised rule, which describes the certification made by the person who signs a pleading, motion, or paper, does not substantially change current law. It is based on the federal rule but modified to reflect the requirement of fact pleading under the Arkansas rules. Also, subsection (b)(5) makes plain that an attorney or a party certifies that he or she has consulted with and obtained an opinion from an expert, or learned the opinion of an expert in discovery, as to the reasonableness of a claim or affirmative defense, which may only be established, in whole or in part, by expert testimony. This provision replaces the affidavit

requirement for medical injury cases invalidated in *Summerville v. Thrower*, *supra,* but is not limited to cases of that type.

As under former Rule 11(a), subdivision (c)(1) requires the trial court to impose "an appropriate sanction" upon finding that the rule has been violated. Subdivision (c)(2) sets out a non-exclusive list of seven sanctions, six of which are identical or analogous to those in Ark. R. App. P.–Civ. 11(c). The other sanction, referring counsel to the Committee on Professional Conduct, is clearly within the power of the trial court. *See Ligon v. Stilley,* 2010 Ark. 418, 371 S.W.3d 615. The introductory clause in subdivision (c)(2) is taken from Ark. R. App. P.–Civ. 11(c) and does not limit a sanction to that sufficient to serve as a deterrent. *Compare* Fed. R. Civ. P. 11(c)(4) (sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated").

In *Crockett & Brown v. Wilson,* 321 Ark. 150, 901 S.W.2d 826 (1995), the Supreme Court held that an order imposing monetary sanctions under Rule 11 must explain the basis for the trial court's decision. This requirement, the court said, is necessary for effective judicial review. Id. at 159, 901 S.W.2d at 830. Because this rationale applies whether the sanction is monetary or nonmonetary, subdivision (c)(3) requires an explanation regardless of the sanction imposed. It also leaves intact the additional requirement from *Crockett & Brown* that the order must explain the manner by which the amount of a monetary sanction is determined. *Id.* at 159, 901 S.W.2d at 830–31 (listing the factors to be considered).

Under former Rule 11(a), the trial court could act "upon its own initiative" to impose sanctions, without waiting for a motion. However, the rule was silent as to the appropriate procedure. Subdivision (c)(6), which is based on Ark. R. App. P.–Civ. 11(d), fills this gap. *See also* Fed. R. Civ. P. 11(c)(3).

Reporter's Notes (2017): Subdivision (b) was amended to add, "Except as provided in Rule 87 of these rules, " upon adoption of Rule 87.

Reporter's Notes (2018 Amendment): Rule 11(a) was amended to delete references to addresses. Addresses and other contact information that are required to be stated in pleadings, motions and other papers are more appropriately addressed in Rule 10. See Ark. R. Civ. P. 10(a).

HISTORY

Amended July 1, 1986, effective September 15, 1986; amended November 18, 1996, effective March 1, 1997; Amended October 23, 2008, effective January 1, 2009; amended February 26, 2015, effective April 1, 2015; amended December 14, 2017, effective December 14, 2017; amended June 21, 2018, effective September 1, 2018.

Rule 12. Defenses and Objections; When and How Presented; by Pleading or Motion; Motion for Judgment on The Pleadings.

(a) *When Presented*.

> (1) A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her. A defendant served by warning order under Rule 4(g)(3) or (4) shall file an answer within 30 days from the date of first publication or posting of

the warning order. A defendant incarcerated in any jail, penitentiary, or other correctional facility in this state shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him or her shall file an answer or reply thereto within 30 days after service upon the party. The court may, upon motion of a party, extend the time for filing any responsive pleading.

(2) The filing of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after service of the more definite statement. Provided, that nothing herein contained shall prevent a defendant summoned in accordance with Rule 4(f) from being allowed, at any time before judgment, to appear and defend the action; and, upon a substantial defense being disclosed, from being allowed a reasonable time to prepare for trial.

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 30 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

(b) *How Presented*. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

(1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person,

(3) improper venue,

(4) insufficiency of process,

(5) insufficiency of service of process,

(6) failure to state facts upon which relief can be granted,

(7) failure to join a party under Rule 19,

(8) pendency of another action between the same parties arising out of the same transaction or occurrence. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for Judgment on the Pleadings*. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(d) *Preliminary Hearings*. The defenses specifically enumerated (1)–(8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for More Definite Statement*. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion is directed or make such order as it deems just.

(f) *Motion to Strike*. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) *Consolidation of Defenses in Motion*. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds therein stated.

(h) *Waiver or Preservation of Certain Defenses*.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same transaction or occurrence is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither

made by motion under this rule nor included in the original responsive pleading. Objection to venue may be made, however, if the action is dismissed or discontinued as to a defendant upon whose presence venue depends.

(2) A defense of failure to state facts upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. The defense of lack of jurisdiction over the subject matter is never waived and may be raised at any time.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Upon a determination that venue is improper, the court shall dismiss the action or direct that it be transferred to a county where venue would be proper, with the plaintiff having an election if the action could be maintained in more than one county.

(i) *Response to Motions; Reply.* Any response in opposition to a motion under this rule and any reply to such a response shall be made as provided in Rules 6(c) and 7(b).

(j) *Further Pleading.* Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further.

Reporter's Notes to Rule 12: 1. Rule 12(a) is a revised and condensed version of FRCP 12(a). Its purpose is to prescribe the mechanics and timetable for filing responsive pleadings. Its substance is substantially the same as the Federal Rule.

2. The times prescribed in Section (a) for filing responsive pleadings are taken in part from the Federal Rule and in part from prior Arkansas law. Superseded Ark. Stat. Ann. § 27-1135 (Repl. 1962) provided that a defendant must plead to a complaint or cross-complaint on the first day after the expiration of twenty days where service was made inside this State and thirty days where service was made outside the State. Thus, a defendant had twenty-one or thirty-one days within which to file a response depending upon where service was effected. Under Section (a), the "extra" day for filing a response is eliminated.

3. This rule allows a nonresident of this State a period of thirty days to plead regardless of where service was effected and regardless of whether service was effected through a resident agent in this State.

4. Where a defendant is served by warning order, the thirty-day period commences upon the date of the first publication of the warning order. This compares with superseded Ark. Stat. Ann. § 27-1135 (3) (Repl. 1962) which provided that an appearance must have been made after thirty days had elapsed from the making of the warning order and appointment of the attorney ad litem.

5. Rule 12 substitutes the word "file" for serve and requires that the responsive pleading be filed within the time prescribed by this rule as opposed to serving the pleading as is the case under

FRCP 12. By using this terminology, it is believed that arguments can be avoided as to when a pleading was served.

5 [6]. Section (a) follows the Federal Rule and superseded Ark. Stat. Ann. §§ 27-1135 and 27-1137 (Repl. 1962) by allowing a period of twenty days within which to file a responsive pleading to a cross-claim or counterclaim.

6 [7]. Section (a) follows the Federal Rule by permitting the trial court to extend the time for filing any responsive pleading. This is in accord with prior Arkansas practice.

7 [8]. Section (b) sets forth the defenses which may be raised by motion prior to filing a responsive pleading. These defenses are essentially the same as those previously raised by motions to quash service and demurrers. This section is identical to Section (b) of the Federal Rule with the exception of the addition of (b)(8) which is a defense previously allowed under Ark. Stat. Ann. § 27-1115 (3) (Repl. 1962). One important feature of this section is that it abolishes the distinction between general and special appearances; thus, it is not (is not) necessary to make a special appearance in order to challenge the jurisdiction of the person, process or venue. *Blank v. Bitker*, 135 F. 2d 962 (C.C.A. 7th, 1943); *Product Promotions, Inc. v. Cousteau*, 495 F. 2d 483 (C.C.A. 5th, 1974). 10 [9]. Sections (c) through (h) track FRCP 12(c) through (h) with the exception that Section (h)(1) takes into account the additional defense designed as (8) in 12(b) relating to the pendency of another action between the parties.

Additions to Reporter's Notes, 1984 Amendments: Rule 12(h)(1) is amended to make it clear that the stated "waivable" defenses must be raised by motion pursuant to this rule or in the first responsive pleading or they are waived. The final sentence in this subsection excepts the objection to venue in the circumstances described in Ark. Stat. Ann. 27-614 (Repl. 1979), which is now superseded.

Addition to Reporter's Notes, 1987 Amendment: Two new sections, based on provisions of the Uniform Rules for Circuit and Chacery [Chancery] Courts, have been added to Rule 12 in the interest of clarity and simplification. New section (i), which sets forth the time in which responses to motions must be filed, as well as the time period for the movants to file replies, tracks Uniform Rule 2(c) and (d). Though this requirement is also found in Rule 78(b) of the Rules of Civil Procedure, it is repeated here in a more conspicuous manner to assist users of the Rules. New section (j), borrowed from Rule 2(f) of the Uniform Rules, simply states that the court is to specify the time in which further pleading is allowed in the event the court grants a motion to dismiss and the deficiency can be remedied. These new provisions do not alter prior Arkansas practice.

Addition to Reporter's Notes, 1997 Amendment: Paragraph (3) of subdivision (h) has been amended by adding a new sentence authorizing the court to transfer the case in the event that venue is improper. Rather than dismiss the action, the court may transfer it to any county where venue would be proper, with the plaintiff having an election if venue would lie in more than one county. The revised provision is generally consistent with Arkansas case law and the practice in the federal courts. *See Terminal Oil Co. v. Gautney*, 202 Ark. 748, 152 S.W.2d 309 (1941); *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518(1989); 28 U.S.C. 1406(a).

Addition to Reporter's Notes, 2000 Amendment: The second sentence of subdivision (h)(3) has been amended by replacing the introductory phrase "whenever it appears" with "upon a determination." This change eliminates the unintended suggestion in the original version of the sentence that a motion to dismiss for improper venue, like a motion to dismiss for lack of subject matter jurisdiction, can be made at any time. As subdivision (h)(1) of the rule makes plain, improper venue is a waivable defense.

Addition to Reporter's Notes, [February] 2001 Amendment: As adopted in 1987, the first sentence of subdivision (i) referred to "a motion made under this or any other rule." The words "or any other" have been deleted because of the 2001 amendment to Rule 56(c) establishing time frames for summary judgment motions and responses. Other motions are covered by Rule 78(b).

Addition to Reporter's Notes, [May] 2001 Amendment: Paragraph (3) of subdivision (h) has been amended to reflect Constitutional Amendment 80, under which the circuit court is the single court of general jurisdiction in the state. A clause in the first sentence providing for transfer in the event that the court lacks subject matter jurisdiction has been deleted because there are no longer separate circuit, chancery, and probate courts. Left intact, however, is language directing the court to dismiss the action whenever it appears that subject matter jurisdiction is lacking. This provision comes into play when, for instance, the Constitution assigns original jurisdiction to another court. By way of example, the Supreme Court has original jurisdiction to determine the sufficiency of state initiative and referendum petitions and proposed constitutional amendments. Furthermore, while state courts generally have concurrent jurisdiction with the federal courts to decide cases arising under federal law, state courts are without subject matter jurisdiction if Congress has made federal jurisdiction exclusive. *See, e.g.*, 28 U.S.C. 1338(a) (patent and copyright cases).

Addition to Reporter's Notes, 2002 Amendment: Subdivision (i) of the rule previously included time periods for serving responses to motions and replies to responses. These matters are now governed by Rule 6(c), and subdivision (i) has been amended to provide a cross-reference to that provision. There has also been added a cross-reference to Rule 7(b), which governs the content of motions, responses, and replies.

Addition to Reporter's Notes, 2003 Amendment: Under revised subdivision (a), a person "incarcerated in any jail, penitentiary, or other correctional facility in this state" has 30 days in which to respond to a complaint. This additional time helps ensure that such a defendant has an opportunity to obtain counsel and to be heard in the action. Subdivision (h)(2) has been amended to provide that the defense of lack of subject matter jurisdiction is never waived and may be asserted at any time. The new sentence simply restates settled law.

Addition to Reporter's Notes, 2004 amendment: Subdivision (a) has been divided into three paragraphs and other stylistic changes made. The two departures from prior law appear in what are now paragraphs (1) and (3). Under the first paragraph, the time for an incarcerated defendant to file an answer has been increased from 30 days to 60 days. This change recognizes the role of prison employees under Rule 4(d)(4) in delivering the summons and complaint, the possibility that delays in such delivery may occur, and the likelihood that securing legal representation will take longer for incarcerated persons than for other defendants. Paragraph (3) deals with an issue previously covered in Rule 55(f), i.e., the time period for responding to a complaint after a

federal court has remanded a removed case to state court. The new paragraph expands that period from 10 to 20 days and states more clearly the point at which the time begins to run. *See NCS Healthcare v. W.P. Malone, Inc*., 350 Ark. 520, 88 S.W.3d 852 (2002). Because of new language in Rule 55(f), a defendant who filed an answer or Rule 12 motion in federal court while the case was pending there need not, following remand, take the same action in state court within the 20-day grace period to avoid a default judgment. *See* Addition to Reporter's Notes to Rule 55 (2004 amendment).

Addition to Reporter's Notes, 2011 Amendment: Subdivision (a)(1) has been amended to require that both resident and nonresident defendants file a | response within 30 days after service of the summons and complaint. The rule previously required that the resident defendant file the response within 20 days. On occasion the different response times led to the issuance of an incorrect summons by the clerk's office and subsequent issues as to the sufficiency of process. In addition, modern means of communication and electronic transmission diminish the need to distinguish between response times for resident and nonresident defendants. The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant must respond to a complaint when a case is remanded from federal court. Subdivision 12(f) similarly is amended to require that a motion to strike be filed within 30 days of service of the pleading upon a party.

COMMENT

Reporter's Notes (2019 Amendment): Subdivision (a)(1) has been amended to insert the correct cross-reference to Ark. R. Civ. P. 4(g)(3) or (4).

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended July 6, 1987, effective September 21, 1987; amended November 18, 1996, effective March 1, 1997; amended January 27, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended June 2, 2011, effective July 1, 2011; amended June 21, 2018, effective January 1, 2019.

Rule 13. Counterclaim and Cross-Claim.

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) *Permissive Counterclaim.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim Exceeding Opposing Claim*. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim Maturing or Acquired After Pleading*. A claim which either matured or was acquired by the pleader after filing his pleading shall be presented as a counterclaim by supplemental pleading, provided that if such counterclaim matures or is acquired after all issues are joined, it may be asserted by the pleader in a separate action.

(e) *Omitted Counterclaim*. When a pleader fails to assert a counterclaim, he shall be entitled to assert such counterclaim by amended or supplemental pleading subject to the requirements and conditions of Rule 15.

(f) *Cross-Claim Against Co-Party*. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject matter either of the original action or of a counterclaim therein or relating to any property which is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) *Joinder of Additional Parties*. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(h) *Separate Trials; Separate Judgments*. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Reporter's Notes to Rule 13: 1. With the exception of one minor wording change, Sections (a) and (b) are otherwise identical to FRCP 13(a) and (b). The word "serving" found in the Federal Rule is omitted and the word "filing" is substituted therefor. These sections abolish the strict compulsory counterclaim rule in Arkansas as codified in superseded Ark. Stat. Ann. § 27-1121 (Repl. 1962). Under this and the Federal Rule, the only counterclaims which are compulsory are those which arise out of the same transaction or occurrence. Otherwise, a counterclaim is permissive.

2. Section (c) is identical to FRCP 13(c) and does not change Arkansas law.

3. Section (d) of the Federal Rule is eliminated inasmuch as these rules cannot enlarge one's right to assert a counterclaim against the United States or any officer or agent thereof.

4. Section (d) is a revision of FRCP 13(e) and recognizes those rare occasions where a counterclaim arises after pleadings are served.

5. Section (e) is a revision of FRCP 13(f). Under the Federal Rule, delay in asserting a counterclaim may be fatal to one's right to assert such claim. *Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co*., 146 F. 2d 165 (C.C.A. 8th, 1945). This section follows

superseded Ark. Stat. Ann. § 27-1160 (Supp. 1975), by permitting a counterclaim to be asserted by amended pleading as any other amendment, subject to the conditions of Rule 15.

6. Section (e) is identical to FRCP 13(g). It follows the intent of superseded Ark. Stat. Ann. § 27-1134.1 (Supp. 1975) by making such claims permissive rather than mandatory.

7. Section (g) follows FRCP 13(h) by allowing other parties to be brought in under the conditions of Rules 19 and 20. This is essentially what was permitted under superseded Ark. Stat. Ann. § 27-1134.2 (Supp. 1975).

8. Rule 42(b) gives the court discretion to grant separate trials where two or more competing claims would otherwise have to be tried together. Section (h) of Rule 13, which is identical to Section (i) of the Federal Rule, answers any possible argument that the claim tried last would be barred by res judicata by reason of the first claim having been reduced to judgment or dismissed.

Addition to Reporter's Note, 1990 Amendment: The amendment deletes the last sentence of subdivision (c), which provided that "[i]n the event the amount asserted in the counterclaim exceeds the monetary jurisdiction of the court in which it is filed, the matter shall be transferred to a court of competent jurisdiction to hear the full extent of the claim and counterclaim." This provision created confusion, since the state courts of general jurisdiction do not have monetary jurisdictional limits. While inferior courts have such limits, counterclaims in those courts are governed by Rule 7 of the Inferior Court Rules [now District Court Rules].

HISTORY

Amended December 10, 1990, effective February 1, 1991.

Rule 14. Third-Party Practice.

(a) *When Defendant May Bring in Third Party*. At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiffs claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than 10 days after he files his answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and the third party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiffs claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant shall thereupon assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third party claim or for its severance or separate trial. A third party defendant may proceed under this rule against any person not a party to the action

who is or may be liable to him for all or part of the claim made in the action against the third party defendant.

(b) *When Plaintiff May Bring in Third Party*. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Reporter's Notes to Rule 14: 1. Rule 14 is substantially the same as FRCP and superseded Ark. Stat. Ann. § 27-1134.1 (Supp. 1975). The latter was patterned after the Federal Rule. Omitted are the references in FRCP 14(a) to admiralty and maritime claims. Section (c) of the Federal Rule is omitted in its entirety.

2. Superseded Ark. Stat. Ann. § 27-1134.1 (Supp. 1975) provided that where a third party complaint was not filed within ten days after the filing of the answer, leave of court on motion was required. This rule follows the requirement contained in the Federal Rule that leave of the court must be obtained on motion upon notice to all parties to the action. This will afford the opportunity to parties already in an action to object to the filing of a third party complaint if objection is warranted.

3. The purpose of Rule 14, as construed by the federal courts, is to facilitate the trial of multiple claims which would otherwise be triable only in separate proceedings. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399 (1951). There is no set time during which a third party action must be initiated by a defendant; rather, the timeliness of defendant's application is left to the discretion of the trial court which must consider whether allowing the third party complaint will result in prejudice to the other parties. *Meilinger v. Metropolitan Edison Co.*, 34 F.R.D. 143 (D.C. Pa., 1963); *Kubik v. Goldfield*, 61 F.R.D. 572 (D.C. Pa., 1974).

Rule 15. Amended and Supplemental Pleadings.

(a) *Amendments*. With the exception of pleading the defenses mentioned in Rule 12 (h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

(b) *Amendments to Conform to the Evidence*. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation Back of Amendments*. An amendment of a pleading relates back to the date of the original pleading when:

> (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) *Supplemental Pleadings*. A party may at any time without leave of court file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of a supplemental pleading, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to a supplemental pleading within the time remaining for response to the original pleading or within 20 days after service of the supplemental pleading, whichever period is longer, unless the court otherwise orders.

Reporter's Notes to Rule 15: 1. Section (a) of Rule 15 marks a substantial change from FRCP 15(a) and is generally in accord with prior Arkansas law. The Committee believed that amendments to pleadings should be allowed in nearly all instances without special permission from the court. The court is, however, given discretion to strike any amendment which would cause prejudice or unduly prolong the disposition of a case. As an alternative to striking an amendment, a continuance could be granted by the trial court. Under prior Arkansas law, trial courts were given broad discretion to permit an amendment to stand. *Hogue v. Jennings*, 252 Ark. 1009, 481 S.W.2d 752 (1972); *Bridgman v. Drilling*, 218 Ark. 772, 238 S.W.2d 645 (1951). Generally speaking, it is the intent of this rule that amendments to pleadings should be permitted without leave of the court in all instances unless it can be demonstrated that prejudice or delay would result. To this extent, Rule 15 is more liberal than superseded Ark. Stat. Ann. § 27-1160 (Repl. 1962) and is certainly more liberal than the Federal Rule.

2. [As amended by Per Curiam, February 26, 1996] Section (b) is identical to FRCP 15(b). It follows prior Arkansas law by permitting amendments to conform to the proof adduced at trial. This rule goes somewhat further, however, by more or less making it mandatory that pleadings be amended to conform to the proof where there has been no objection to such proof. *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (C.C.A. 5th, 1963); *Bradford Audio Corp. v. Pious*, 329 F.2d 67 (C.C.A. 2nd, 1968). Prior Arkansas law granted the trial court considerable discretion to permit pleadings to be amended to conform to the proof where there had been no objection raised. *Velda Rose Motel, Inc. v. Eason*, 241 Ark. 1041, 411 S.W.2d 502 (1967); *Smith v. F. & C. Engineering Co*., 225 Ark. 688, 285 S.W.2d 100 (1956). Where a new or different claim or defense was sought to be presented over the objection of the opposing party, the

pleadings could not be amended to conform to the proof under prior Arkansas law. *Shelton v. Harris*, 225 Ark. 855, 286 S.W.2d 20(1956); *O'Guinn Volkswagen, Inc., v. Lawson*, 256 Ark. 23, 505 S.W.2d 213(1974). This rule does liberalize somewhat prior Arkansas law.

3. With the exception of minor wording changes, Section (c) is identical to FRCP 15(c). The question of relation back of pleadings normally does not arise unless the statute of limitations is involved. Under this and the Federal Rule, an amendment always relates back when it arises out of the conduct, transaction or occurrence set forth in the original pleading. Under prior Arkansas law, the question of whether a pleading related back was determined by whether the amendment asserted a new cause of action against the defendant. If it did, the amended pleading could not stand or relate back. *Warmack v. Askew*, 97 Ark. 19, 132 S.W. 1013(1910); *Love v. Couch*, 181 Ark. 994, 28 S.W.2d 1067 (1930).

4. Section (c) also permits changing the party against whom a claim is asserted if the party sought to be brought in received such notice of the action that he would not be prejudiced if brought in and knew or should have known that but for mistake, he would have been made a defendant initially. Prior Arkansas law was somewhat more prohibitive in that where there was a substantial change in identity of the defendant so as to amount to a change of defendants, the amendment would not be permitted to relate back. *Davis v. Chrisp*, 159 Ark. 335, 252 S.W. 606 (1923); *Arkansas Land & Lumber Co. v. Davis*, 155 Ark. 549, 244 S.W. 730(1922).

5. Omitted from Section (c) is the second paragraph of FRCP 15(c). Such provision is unnecessary under Arkansas practice.

6. Section (d) is identical to Section (d) of the Federal Rule. It is in accord with superseded Ark. Stat. Ann. § 27-1161 (Repl. 1962). Its purpose is simply to allow a pleading to be supplemented to reflect facts which develop after the filing of the original pleading.

Additions to Reporter's Notes, 1984 Amendments: Rule 15(a) is amended so that the first sentence takes account of the amendment to Rule 12(h)(1) making it clear that a waivable defense may not be raised by amendment "at any time."

The Rule is also amended to enlarge from 10 to 20 days the time to respond to an amended pleading.

Addition to Reporter's Notes, 1993 Amendment: Subdivision (c) is revised to prevent parties against whom claims are made from taking unfair advantage of otherwise inconsequential pleading errors to sustain a limitations defense. The changes are based on the 1991 amendments to the corresponding federal rule.

Paragraph (1) is simply a restatement of the general "relation back" principle and works no change in the law. However, paragraph (2) effectively overturns the interpretation that had been given FRCP 15 with respect to a misnamed defendant. *See Schiavone v. Fortune,* 477 U.S. 21 (1986), cited with approval in *Harvill v. Community Methodist Hospital Ass'n,* 302 Ark. 39, 786 S.W.2d 577 (1986), and *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993). Under the revised rule, an intended defendant who is notified of an action with the period allowed by Rule 4(i) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the

requirements of clauses (A) and (B) have been satisfied. If the notice is received within the period specified in Rule 4(i), including an extension granted pursuant to that rule, a complaint may be amended at any time to correct a formal defect such as a misnomer or mis-identification.

Addition to Reporter's Notes, 2001 Amendment: Subdivision (d), which governs supplemental pleadings, is amended to make its terms parallel with those of subdivision (a), which applies to amended pleadings. By virtue of the amendment, permission of the court to file a supplemental pleading is no longer necessary, although the opposing party may move to strike the pleading on grounds of prejudice or undue delay. Also, a response to the supplemental pleading is now required. Under the original version of the rule, a response was to be filed only if the court "deem[ed] it advisable."

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended November 8, 1993, effective January 1, 1994; amended February 1, 2001.

Rule 16. Pretrial Procedure; Formulated Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of act and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master;

(6) The possibility of settlement or, pursuant to Ark. Code Ann. 16-7-202, the use of extrajudicial procedures, including mediation, to resolve the dispute;

(7) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Reporter's Notes to Rule 16: 1. Rule 16 is essentially the same as FRCP 16. The only change from the Federal Rule is found in Section (5). Under Rule 53, a master is not permitted in jury

actions; hence, the minor wording change. This rule is substantially the same as superseded Ark. Stat. Ann. § 27-2401 (Repl. 1962), which was patterned after FRCP 16.

2. Omitted from Rule 16 is Section (d) of Ark. Stat. Ann. § 27-2401 (Repl. 1962). Motions or applications for the production of documents are matters which should be considered under Rule 34. Also, any unresolved questions concerning documents may be considered by the court and the parties under Rule 16 (3). Overall, this rule should have little effect on prior Arkansas law.

Addition to Reporter's Notes, 1997 Amendment: Former paragraph (6) has been redesignated as paragraph (7) and a new paragraph (6) added to mention the possibility of settlement and the use of extrajudicial procedures, such as mediation. The amended rule, based on a similar provision in the Alabama Rules of Civil Procedure, recognizes that pretrial conferences can be profitably used to discuss settlement. Since it eases congested court dockets and results in savings to litigants and the judicial system, settlement should be facilitated at as early a stage in the litigation as possible. However, settlement conferences are not mandatory and would be a waste of time in many cases. In addition to settlement, paragraph (6) refers to exploring the use of alternative means of dispute resolution, such as mediation, in accordance with Ark. Code Ann. § 16-7-202.

HISTORY

Amended November 18, 1996, effective March 1, 1997.

Rule 17. Parties Plaintiff and Defendant.

(a) *Real Party in Interest*. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian (conservator), bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or the State or any officer thereof or any person authorized by statute to do so may sue in his own name without joining with him the party for whose benefit the action is being brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants or Incompetent Persons*. Whenever an infant or incompetent person has a guardian, the guardian must sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed guardian, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent. No judgment shall be rendered against an infant or incompetent until after a defense by a guardian or guardian ad litem, who shall be appointed by the court upon application of any interested party and who shall promptly respond to the claim against the infant or incompetent as provided by these Rules.

Reporter's Notes to Rule 17: 1. Rule 17 is a slightly modified version of FRCP 17. Basically this rule deletes various provisions of Sections (a) and (b) of FRCP 17 which have reference to actions brought by the United States or under a federal statute and to diversity of citizenship actions.

2. Section (a) is essentially the same as superseded Ark. Stat. Ann. §§ 27-801 and 27-804 (Repl. 1962). It has generally been held that the real party in interest is the person who can discharge the claim upon which the action is brought and not necessarily the person who is ultimately entitled to the benefit of recovery. *House v. Long*, 244 Ark. 718, 426 S.W.2d 814 (1968). The federal courts have generally held that the effect of such rule is to require the action to be brought by the person who is entitled to enforce the right or claim. Wright & Miller, *Federal Practice and Procedure*, § 1543. The list of persons in 17(a) is not meant to be conclusive and exhaustive and any person possessing the right to enforce a particular claim is deemed the real party in interest even though he is not specifically identified in the rule. Section (a) of this rule does not appreciably alter Arkansas law on real parties in interest.

3. While the Federal Rule is not clear on whether objection to a party as not being the real party in interest must be made by Rule 12(b) motion or by answer, *Ohmer Corp. v. Duncan Meter Corp*., 8 F.R.D. 582 (D.C. III., 1948) and *Clark v. Chase National Bank*, 45 F. Supp. 820 (D.C. NY, 1942), Rule 12(b) does permit such objection without any question, although the objection can be raised under Rule 8(c).

4. Section (b) of the Federal Rule is omitted in its entirety from Rule 17 as it is not applicable to actions in state court.

5. Section (b) of this rule is basically the same as FRCP 17(c). Omitted from the Federal Rule are all those persons designated as representatives of an infant or incompetent except a guardian. The parenthetical reference to a conservator is made necessary by Ark. Stat. Ann., Title 57, Ch. 7 (Supp. 1977). Rule 17 makes it mandatory that a guardian sue or defend as opposed to the permissive feature of FRCP 17.

6. Section (c) is not found in the Federal Rule. It is thought to be worthwhile as giving a measure of protection to prisoners who might not otherwise be protected. This section tracks superseded Ark. Stat. Ann. § 27-833 (Repl. 1962). See also Rule 7.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (c), which has no counterpart in Fed. R. Civ. P. 17, has been deleted. Borrowed from a superseded statute that was part of the Civil Code of 1868, the subdivision stated that "[n]o judgment shall be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him." Because of the elimination of subdivision (c), prisoners no longer receive special treatment with respect to default judgments. *See Zardin v. Terry*, 275 Ark. 452, 631 S.W.2d 285 (1982). However, the safeguards in Rule 4(d)(4) and Rule 12(a)(1) afford incarcerated persons notice, the opportunity to be heard, and the opportunity to obtain counsel. Rule 12(a)(1), as amended in 2004, provides that incarcerated persons have 60 days after service of process in which to file an answer, compared to the 20-day period for residents of the state. This differential reflects the role of prison employees in delivering the

summons and complaint, as well as the likelihood that an incarcerated person will need more time than other defendants to arrange for legal representation.

HISTORY

Amended January 22, 2004.

Rule 18. Joinder of Claims and Remedies.

(a) *Joinder of Claims*. A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or alternate claims, as many claims, legal or equitable, as the party may have against an opposing party, provided that nothing herein shall affect the obligation of a party under Rule 13(a).

(b) *Severance and Transfer*.

(1) Any claim against a party may be severed and proceeded with separately.

(2) If the court determines that the action, or a particular claim, should in the interest of justice or judicial economy be heard in another division, the court may transfer it to that division.

(c) *Joinder of Remedies; Fraudulent Conveyances*. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained judgment establishing the claim for money.

Reporter's Notes to Rule 18: 1. Rule 18 is a modified version of FRCP 18. Its effect is to substantially change Arkansas procedural rules. Under superseded Ark. Stat. Ann. § 27-1301 (Repl. 1962), joinder of claims was limited to those classes of actions specifically enumerated; however, under Rule 18, joinder of all claims is permitted, regardless of whether they are equitable or legal in nature.

2. Section (b) permits the trial court to grant a severance of joined claims or to order a transfer of a particular claim between law and chancery courts so as to do justice and facilitate the disposition of an action. This provision confers broad discretion upon the trial court in granting or denying a severance or transfer.

3. As under the Federal Rule, the joinder of claims under this rule is permissive and not mandatory. *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (C.C.A. 9th, 1969); McConnell v. Travelers Indem. Co., 346 F. 219 (C.C.A. 5th, 1965). Also, where the joinder of claims will result in prejudice or inconvenience to the court or the parties, the court may order separate trials under Rule 42(b).

4. Section 18(c) is identical to FRCP 18(b). The specific remedy mentioned in FRCP 18(b) is illustrative only and does not limit the application of the rule to that particular remedy. Wright & Miller, *Federal Practice and Procedure*, § 1591.

Addition to Reporter's Notes, 2001 Amendment: Subdivisions (a) and (b) have been amended in light of Constitutional Amendment 80, which established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

New language in subdivision (a) authorizes joinder of claims whether "legal or equitable," as does the corresponding federal rule. Amendment 80's merger of law and equity removed any barriers to the joinder of legal and equitable claims in a single action. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) ("the liberal joinder provisions of the Federal Rules ... allow legal and equitable causes to be brought and resolved in one civil action").

Previously, subdivision (b) stated that a trial court could "make appropriate orders affecting severance of claims and may transfer claims between courts of law and equity on appropriate jurisdictional grounds." This provision has been deleted because of Amendment 80 and replaced with two paragraphs.

Under new paragraph (1), which tracks the language of Rule 21, any claim "may be severed and proceeded with separately." New paragraph (2) permits the transfer of a particular claim, or the entire action, from one division of the circuit court to another "in the interest of justice or judicial economy." Administrative Order No. 14, adopted by the Supreme Court pursuant to Amendment 80, requires that the circuit judges of each judicial circuit establish five divisions in each county of the circuit: criminal, civil, juvenile, probate, and domestic relations. Creation of these divisions has no jurisdictional significance. *See* 2001 Reporter's Note accompanying Rule 2.

In the system contemplated by Amendment 80 and Administrative Order No. 14, severance should be employed sparingly and only when multiple claims in a single action are wholly unrelated. If the claims arise from the same transaction or occurrence, a series of transactions or occurrences, or a common nucleus of operative fact, they should not be severed and then transferred to another division of the circuit court for disposition. Severance and transfer in this situation would be at odds with the purpose of Amendment 80, which was designed to eliminate the jurisdictional lines that had forced cases to be divided artificially and litigated separately in different courts. *See, e.g.*, *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976).

HISTORY

Amended May 24, 2001, effective July 1, 2001.

Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) *Persons to Be Joined if Feasible*. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff.

(b) *Determination by Court Whenever Joinder Not Feasible*. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Exception of Class Actions*. This rule is subject to the provisions of Rule 23.

Reporter's Notes to Rule 19: 1. Rule 19 deals with compulsory joinder of parties. With the exception of the omission of the last sentence of FRCP 19(a), this rule is the same as its federal counterpart. It is believed that the omitted sentence dealing with venue is unnecessary under state practice. Section 19(a) requires the person joined to be subject to service of process; therefore, the fact that such person could otherwise object to venue is of no consequence where existing defendants are properly before the court. This is the effect of Ark. Stat. Ann. § 27-615 (Repl. 1962) which remains unaffected by these rules.

2. Section 19(a) concerns itself with the question of who is a "necessary" party while 19(b) deals with whether a necessary party is an indispensable party. *Wright v. First National Bank*, 483 F.2d 73 (C.C.A. 10th, 1973); *Charon v. Meaux*, 60 F.R.D. 107 (D.C. N.Y., 1973). The policy behind FRCP 19 is to avoid dismissal of actions where possible and when it is possible to join an absent party, dismissal is not proper as such party will be ordered to enter the action as a defendant or plaintiff.

3. Superseded Ark. Stat. Ann. § 27-808 (Repl. 1962) provided that parties who were united in interest must be joined as plaintiffs or defendants. Superseded Ark. Stat. Ann. § 27-814 (Repl. 1962) provided that where a controversy could not be resolved without prejudice to others or by preserving their rights, then the other parties had to be brought in as parties. This rule, following FRCP 19, abolishes the rigid distinctions between necessary and indispensable parties and instead places the emphasis upon the practical effects a judgment might have upon an absent party.

4. Section (c) of FRCP 19 is omitted from this rule. If there are questions as to defects in parties plaintiff, it is the Committee's view that this is more appropriately an issue which should be raised by a defendant under Rule 12(b).

5. The exception of class actions in 19(c) is for obvious reasons. Rule 23 suggests that absent class members can never be considered indispensable and it is doubtful that they can be considered necessary parties. *Watson v. Branch County Bank*, 380 F. Supp. 945 (D.C. Mich., 1974).

Rule 20. Permissive Joinder of Parties.

(a) *Permissive Joinder*. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction,

occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate Trials*. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice.

Reporter's Notes to Rule 20: 1. Rule 20 basically tracks prior Arkansas law. Section 20(a) is identical to superseded Ark. Stat. Ann. § 27-806 (Repl. 1962) which was taken from FRCP 20. Omitted from this rule is the reference in the Federal Rule to admiralty actions; otherwise, the two sections are identical.

2. Section 20(b) is identical to superseded Ark. Stat. Ann. § 27-807 (Repl. 1962) and FRCP 20(b). Overall, Rule 20 works no changes in Arkansas practice and procedure.

Rule 21. Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and upon such terms as are just. Any claim against a party may be severed and proceeded with separately.

Reporter's Notes to Rule 21: 1. Rule 21 is identical to FRCP 21. There was no comparable provision under prior Arkansas law and a defect in parties was generally raised by demurrer where the defect appeared on the face of the complaint and by answer where the defect was not so evident. Under prior law, a defect in parties was ground for dismissal of the cause whereas under this rule, the cause is not dismissed, but rather the defect is simply cured by adding or striking parties upon motion of a party or by the court on its own motion.

2. Rule 21 should have no appreciable effect on Arkansas law. A defect in parties was non-fatal under prior Arkansas law in that it could be waived. *Province v. Dean*, 223 Ark. 508, 266 S.W.2d 812 (1954). A defect in parties remains non-fatal under this rule. This rule does, however, confer upon the trial court additional discretion to cure a misjoinder or non-joinder on its own motion.

Rule 22. Interpleader.

(a) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are

adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim, third-party complaint or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) A plaintiff who disclaims any interest in the money or property that is the subject of the interpleader action shall, upon depositing the money or property in the registry of the court, be discharged from all liability. The court may make an award of reasonable litigation expenses, including attorneys' fees, to such a plaintiff.

Reporter's Notes to Rule 22: 1. Rule 22 is identical to FRCP 22 and does alter prior Arkansas law. Superseded Ark. Stat. Ann. §§ 27-816 (Repl. 1962), et seq. set forth prior interpleader procedure and it is this procedure, rather than the substance of prior law which is changed by this rule.

2. Previously, upon depositing money or property into the registry of the court, a plaintiff was released from all further liability and was awarded his costs and a reasonable attorney's fee. Under this rule, as under FRCP 22, the allowance of costs and fees rests in the sound discretion of the trial court. *Gulf Oil Corporation v. Oliver*, 412 F.2d 938 (C.C.A. 5th, 1969).

3. Prior Arkansas law did not expressly require a deposit of the disputed funds or property into the registry of the court, but it was clear that the plaintiff could not be discharged from further liability or awarded costs and fees until he had deposited the money or property. Under this and the Federal Rule, a deposit is not a jurisdictional prerequisite, but may be required by the court in its discretion so as to safeguard the property and insure the satisfaction of a judgment. *Emmco Ins. Co. v. Frankford Trust Co*., 352 F. Supp. 130 (D.C Pa., 1972). Compare, however, *Miller & Miller Auctioneers, Inc. v. Murphy Industries, Inc*., 472 F.2d 893 (C.C.A. 10th, 1973).

4. Prior Arkansas law required interpleader actions to be brought in chancery court. The decisions under FRCP 22 make it clear that an interpleader is equitable in nature. *United Benefit Life Ins. Co. v. Leech*, 326 F. Supp. 598 (D.C. Pa., 1971); *Home Ins. Co. v. Moore*, 499 F.2d 1202 (C.C.A. 8th, 1974). Under this rule, however, interpleader actions are not limited to courts of equity.

Addition to Reporter's Notes, 1993 Amendment: Rule 22 is amended by adding new subdivision (b), which provides that a disinterested stakeholder—i.e., a plaintiff who disclaims any interest in the money or property—is to be discharged from liability upon depositing the money or property in the registry of the court. Further, such a disinterested stakeholder may be awarded attorneys' fees and other litigation expenses, in the discretion of the court. Subdivision (b) is based on a statute that was superseded when Rule 22 was adopted; however, the revised rule departs from the statute by making a fee award discretionary rather than mandatory. See Ark. Stat. Ann. § 27-816 (Repl. 1962). Absent express authorization, a fee award is impermissible in an interpleader action, even though the stakeholder is disinterested and brings about resolution of the conflicting claims by initiating the action. *See, e.g., Saunders v. Kleier,* 296 Ark. 25, 751 S.W.2d 343 (1988).

Addition to Reporter's Notes, 2001 Amendment: The word "trial," which modified "court" in the second sentence of subdivision (b), has been deleted. Constitutional Amendment 80

established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

HISTORY

Amended November 8, 1993, effective January 1, 1994; amended May 24, 2001, effective July 1, 2001.

Rule 23. Class Actions.

(a) *Prerequisites to Class Action*. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. At an early practicable time after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. For purposes of this subdivision, "practicable" means reasonably capable of being accomplished. An order under this section may be altered or amended at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.

(c) *Notice*. (1) In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

(2) The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance and participate in person or through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members.

(3) In any class action in which no monetary relief is sought, the court may require any notice it deems appropriate in the circumstances.

(4) The cost of any notice shall be borne by the representative parties; provided, however, that the court may shift all or part of the cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) *Orders in Conduct of Actions*. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dividing the class into subclasses, treating each subclass as a class, and construing and applying the provisions of this rule accordingly; and (6) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) *Dismissal or Compromise*. (1) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court may approve any such resolution that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) The court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval. An objection may be withdrawn only with the court's approval.

Reporter's Notes (as modified by the Court) to Rule 23: 1. Class actions in Arkansas have been governed by Ark. Stat. Ann. § 2-809 (Repl. 1962) which provide minimum procedural rules. This rule does not change prior law.

2. Rule 23 confers broad discretion upon the trial court to dictate such terms as are necessary to protect the rights of absent class members. This discretion is also conferred upon the federal courts by FRCP 23.

3. In Arkansas, many of the class action cases have involved actions brought by and against members of unincorporated associations such as labor unions. *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *International Brotherhood v. Blassingame*, 226 Ark. 614, 293 S.W.2d 444(1956). *See also Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664(1960). Such actions shall henceforth be brought pursuant to Rule 23.2.

4. Under prior Arkansas law, class actions could be maintained in either law or equity. *Thomas, supra*. This rule does not affect jurisdiction and thus such actions may still be maintained in either court.

Addition to Reporter's Note, 1990 Amendment: Subdivision (a) has been completely rewritten to set out the requirements for numerosity, commonality, typicality, and adequate representation. As revised, subdivision (a) is identical to the corresponding federal rule. Former subdivision (c) has been modified slightly and redesignated as subdivision (e). Under the revised version, which is based on the corresponding federal rule, notice of a proposed dismissal or compromise is mandatory rather than discretionary. New subdivision (c) requires that the best practicable notice of the pendency of class actions seeking monetary relief, whether legal or equitable, be given to all class members. Among other things, the notice must advise class members of their right to participate in or be excluded from the litigation. When monetary relief is sought, class members must, as a matter of due process, be given such notice and afforded the opportunity to "opt out" of the class action. *See Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). It is not clear from Shutts whether due process requires such notice when the class action involves only injunctive or declaratory relief. *Id*. at 811 n. 3. Subdivision (c) does not impose such a requirement in such circumstances, but the trial court may, pursuant to subdivision (d), order that notice be given. The last sentence of subdivision (c) makes clear that the class representatives must initially bear the cost of the notice, though such cost may ultimately be shifted to the opposing parties. This practice is followed in the federal courts. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Subdivision (d) has been revised to take into account the foregoing changes and to spell out in further detail the trial court's discretion in the management of a class action. It is virtually identical to the corresponding federal rule.

Addition to Reporter's Note, 2006 Amendment: All parts of the Rule have been revised. Many of these changes echo recent amendments to Federal Rule of Civil Procedure 23, while others incorporate the holding of recent Arkansas decisions and current Arkansas practice. With a few exceptions, the changes are technical and do not change Arkansas law.

Another prerequisite—the adequacy of class counsel—has been added to subdivision (a). This addition conforms the Rule to Arkansas law. *E.g., Mega Life & Health Insurance Co. v. Jacola*, 330 Ark. 261, 275, 975 S.W.2d 898, 904(1997). Relevant factors for the circuit court's evaluation of class counsel include: counsel's work identifying and investigating potential claims, counsel's experience in handling class actions, complex litigation, and claims of the type asserted; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. *See generally*, Federal Rule of Civil Procedure 23(g). Unless a showing is made to the contrary, however, Arkansas law presumes that the class representative's counsel "will vigorously and competently pursue the litigation." *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 80, 76 S.W.3d 243, 247 (2002).

Subdivision (b) on the timing of the circuit court's certification decision has been amended. The former rule required a certification decision as soon as practicable after the lawsuit commenced. That requirement, however, neither captured the prevailing practice nor recognized the good reasons for delaying the certification decision, such as the need for limited discovery on the Rule 23(a) prerequisites. The revised Rule requires a decision on certification at an early practicable time, which is the current standard in the federal Rule. That standard gives the circuit court and the parties some flexibility, while leaving intact the settled Arkansas law that the court may not inquire into the merits at the certification stage. *E.g., Speights v. Stewart Title Guaranty Co., Inc.,* 2004 WL 1354279 (30 September 2004) (Supplemental Opinion Denying Rehearing).

The amendment deletes the phrase "may be conditional" from the part of subdivision (b) authorizing the circuit court to alter or amend a certification order. The deleted phrase is superfluous; the Arkansas cases on point have emphasized the circuit court's power to reconsider, affirm, alter, modify, or withdraw certification. *E.g., Fraley v. Williams Ford Tractor and Equipment Co.*, 339 Ark. 322, 347, 5 S.W.3d 423, 438-39 (1999). All of these actions spring from the power to alter or amend a certification order. This change brings the Arkansas Rule back into conformity with the federal Rule.

The amendment also replaces the phrase "before the decision on the merits" in subdivision (b) with the phrase "at any time before the court enters final judgment." This change follows an amendment to the federal Rule; it better reflects the duration of the circuit court's authority to modify its certification decision; and it should give the circuit court greater flexibility to deal with developments late in the litigation but before final judgment.

A new sentence has been added to the end of subdivision (b). As the cases make plain, the certification order must define the class in sufficiently definite terms so that the court and the parties may identify the class members. *E.g., Ferguson v. Kroger*, 343 Ark. 627, 631-32, 37 S.W.3d 590, 593 (2001). Identifying the claims, issues, and defenses will likewise help in identifying class members and expedite the resolution of the litigation. The amendment tracks existing Arkansas law and the federal Rule. This amendment does not alter the precedent holding that the circuit court is not required to perform a rigorous analysis of the case at the certification stage. *E.g., THE/FRE, Inc. v. Martin*, 349 Ark. 507, 514, 78 S.W.3d 723, 727 (2002). But the circuit court must "undertake enough of an analysis to enable [the appellate court] to conduct a meaningful review." *See Lenders Title Co. v. Chandler*, 353 Ark. 339, 349, 107 S.W.3d 157, 162 (2003).

Subdivision (c) on notice has been rewritten and divided into subparts. The changes specify the contents of the notice in clearer terms, make a plain-statement requirement for the notice explicit, and bring the Arkansas Rule in line with the comparable federal Rule. A provision explicitly authorizing the circuit court to require notice in class actions where no monetary relief is sought has also been added. All these revisions are technical and do not change Arkansas law.

A new sentence (5) has been added to subdivision (d) to recognize the circuit court's authority to create subclasses. The Arkansas cases have assumed this authority, and implicitly approved it, for almost twenty years. *E.g., Int'l Union of Ethical, Radio and Machine Workers v. Hudson*, 295 Ark. 107, 117, 747 S.W.2d 81, 86-87 (1988); *State Farm Fire & Casualty Co. v. Ledbetter*, 355 Ark. 28, 35-36, 1295 S.W.3d 815, 820-21 (2003). The federal Rule authorizes subclasses, which

are often useful. This change conforms the Rule to current Arkansas practice. Former sentence (5) has been renumbered as (6).

Subdivision (e) about dismissal and compromise has been rewritten. With some exceptions, the revised Rule restates Arkansas law in the clearer terms of Federal Rule of Civil Procedure 23(e) and incorporates current Arkansas practice. For example, proposed settlements are evaluated now for fairness, reasonableness, and adequacy. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 838 (2002). Subdivision (1) also requires the circuit court to hold a fairness hearing before approving any proposed settlement. This is a new requirement, though fairness hearings are routine in most class actions. Subdivision (2) requires the parties seeking approval of any settlement to file a statement identifying side agreements. This new requirement will promote fairness in settlements and mirrors the federal Rule. Subdivision (3) gives the circuit court discretion to open a second opt-out window if the circumstances justify it. The federal Rule contains this option, and it merely recognizes the circuit court's power to fashion all appropriate relief as part of approving any proposed settlement. Finally, subdivision (4) requires court approval before an objection may be withdrawn. Objections often can, and should be, resolved by the parties. This new requirement, also drawn from the federal Rule, will help the circuit court insure the fairness of those resolutions in light of the overall proposed settlement of the litigation.

HISTORY

Amended December 10, 1990, effective February 1, 1991; amended May 25, 2006

Rule 23.1. Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Reporter's Notes to Rule 23.1: 1. Rule 23.1 is identical to FRCP 23.1.

2. Both this and FRCP 23.1 are silent concerning the "security for expenses" provision of many state business corporation acts, including that found in Ark. Stat. Ann. § 64-223(c)(d) (Repl. 1962). Since the decision in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221 (1949), it has generally been considered that such acts were substantive in nature and should be followed in diversity actions in federal courts. Consequently, the adoption of this rule does not supersede or repeal the "security for expenses" provision found in the Arkansas

Business Corporation Act. The same is also true with regard to the matter of attorney's fees, which under Ark. Stat. Ann. § 64-223 (Repl. 1962), may be awarded to either plaintiff or defendant, depending upon which prevailed in the action. See Wright & Miller, *Federal Practice and Procedure*, § 1841.

3. This rule follows prior Arkansas law as found in Ark. Stat. Ann.§ 64-223(f) (Repl. 1962) which required court approval to dismiss or compromise a derivative action. This rule goes further, however, and requires that notice of a proposed dismissal or compromise be given to other shareholders or members in such manner as the court may direct. This is simply to afford an opportunity for other stockholders to voice objection to any proposed settlement or dismissal.

Rule 23.2. Actions Relating to Unincorporated Associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Reporter's Notes to Rule 23.2: 1. With the exception of minor wording changes, Rule 23.2 is identical to FRCP 23.2. These wording changes were necessary because of the revision of Rule 23 from FRCP 23.

2. Actions by and against members of unincorporated associations as a class have been long recognized in Arkansas. Since an association cannot sue or be sued in its own name, a class action has been the customary method of bringing suit. *Baskin v. United Mine Workers of America*, 150 Ark. 398, 234 S.W. 464 (1921); *Smith v. Arkansas Motor Freight Lines*, 214 Ark. 553, 217 S.W.2d 249 (1949).

3. Rule 23.2 should have little effect on Arkansas law. The rule simply provides safeguards to ensure that absent members of the association are fully protected. This rule does not affect the principle that individual members of an association are not liable for damages. *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960).

HISTORY

Amended November 11, 1991, effective January 1, 1992.

Rule 24. Intervention.

(a) *Intervention of Right*. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention*. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure*. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. When the constitutionality of a statute of this state affecting the public interest is drawn into question in any action, the court may require that the Attorney General of this state be notified of such question.

Reporter's Notes to Rule 24: 1. Generally speaking, the question of whether to allow an intervention has rested in the discretion of the trial court. There are situations, however, under prior Arkansas law where an intervention has been allowed as a matter of right. Ark. Stat. Ann. § 31-157 (Repl. 1962) permits a person contesting the validity of an attachment or claiming an interest in attached property to intervene to assert his rights. That statute seems to suggest that an intervention is allowed as a matter of right once the proper interest is shown in the subject matter. *Lawrence v. Ford Motor Credit Co*., 247 Ark. 1125, 449 S.W.2d 695 (1970). Likewise, Ark. Stat. Ann. § 34-1809 (Repl. 1962), provides that upon proper showing, a party claiming an interest in property about to be sold at a partition sale can intervene in that action, with the implication that such right is unconditional. Also, Ark. Stat. Ann. § 81-1340(a) (Repl. 1962), seems to suggest that a workmen's compensation carrier has the unconditional right to intervene in an action brought by an injured employee against a third party. Thus, there are at least three situations where the right to intervene is granted by statute as contemplated by Rule 24(a)(1).

2. The Arkansas Supreme Court has held that intervention is not a common law right, but is instead based upon the principle that a party should be permitted to do that voluntarily which, if known, a court would require to be done. *Board of Directors of St. Francis Levee Dist. v. Raney*, 190 Ark. 75, 76 S.W.2d 311 (1934). Accordingly, the court has followed the general rule that only necessary parties could intervene as a matter of right, while permitting the trial court to exercise its discretion in deciding whether others could intervene. *Pulaski County Bd. of Eq. v. American Republic Life Ins. Co.*, 223 Ark. 124, 342 S.W.2d 660 (1961). Section (a)(2) of this rule suggests, however, that an intervention as a matter of right may not be limited to those persons who have been traditionally considered as "necessary" parties.

3. Section (b) does not appear to change to any appreciable degree prior Arkansas law concerning permissive interventions. As noted herein, the question of permitting persons other than those mentioned in Section (a) to intervene rests in the sound discretion of the trial court. Thus, Section (b), does not work any changes in prior law.

Rule 25. Substitution of Parties.

(a) *Death*. (1) If a party dies and the claim is not thereby extinguished, the Court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party, and such substitution may be ordered without notice or upon such notice as the Court may require. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by the service upon the parties of a statement of the fact of death, the action may be dismissed as to the deceased party.

(2) Upon the death of a plaintiff the proper party for substitution shall be his personal representative or, where the claim has passed to his heirs or to his devisees, the heirs or devisees may be substituted for the deceased party. Upon the death of a defendant in an action wherein the claim survives against his personal representative, the personal representative shall be the proper party for substitution. Except in an action for the recovery of real property only, or for the adjudication of an interest therein, the heirs, devisees or personal representative may be the proper parties for substitution as the Court may determine. Where the deceased party is acting in the capacity as personal representative, his successor shall be the proper party for substitution.

(3) Upon the death of any party the Court before which such litigation is pending may, upon the motion of any party, appoint a special administrator who shall be substituted for the deceased party. The powers of such special administrator shall extend only to the prosecution and defense of the litigation wherein he is appointed. No special administrator shall be appointed where there is a general personal representative subject to the jurisdiction of the Court for the deceased party. Where such a general personal representative qualifies after the appointment of a special administrator, the general personal representative shall, upon the motion of any party, or the general personal representative, be substituted for such special administrator. Costs taxed against a special administrator shall not constitute a personal obligation.

(4) In the event of the death of one or more of the plaintiffs or one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Guardians*. If a plenary, limited or temporary guardian is appointed for a party, the court shall upon such terms as it considers just and upon motion of a party or the guardian allow the guardian to be substituted to the extent of his judiciary capacity, for the party for whom the guardian has been appointed.

(c) *Transfer of Interest*. In the case of any transfer of interest, the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of this motion shall be made as provided in subdivision (a) of this rule.

(d) *Public Officers; Death or Separation from Office*. (1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of the substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

> (2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added.

(e) *Limitation of Rule*. The provisions of this rule shall in no way allow a claim to be maintained which is otherwise barred by limitations or non-claim, nor shall the provisions of this rule be determinative of whether or not a claim for or against a deceased party survives his death.

Reporter's Notes to Rule 25: 1. Section (a)(1) is modified from FRCP 25(a) so as to allow, with or without notice, the substitution of parties in the event of the death of a party. This change is predicated upon the assumption that the trial court can best determine whether the substitution is essentially a routine clerical matter or whether it should be allowed only after a hearing. This section is further modified from the Federal Rule by changing the word "may" for "shall" in the last sentence so as to afford the trial court some discretion in deciding whether to dismiss an action.

2. Section (a)(2) represents an attempt to identify the proper parties for substitution on the death of a party and to condense superseded Ark. Stat. Ann. §§ 27-1003, 27-1012, 27-1013 and 27-1014 (Repl. 1962). The purpose of this rule is to permit the action to be prosecuted by or against those who are, following the death of a party, either the real party in interest or representative thereof.

3. Section (a)(3) empowers the trial court to appoint a special administrator for a deceased party in litigation pending before it. This basically tracks the provisions contained in superseded Ark. Stat. Ann. §§ 27-1009 through 27-1011 (Repl. 1962).

4. Section (e) represents an attempt to limit the effect of this rule to the determination of who may be substituted and not to enlarge the time during which a claim may be prosecuted. Neither does it determine which claims survive the death of a party. Specifically, Ark. Stat. Ann. §§ 27-901 through 27-910 (Repl. 1962), remain unaffected by Rule 25.

Additions to Reporter's Notes, 1984 Amendments: Rule 25(b) is amended to make it compatible with the Limited Guardianship Act and Rule 4(d)(1) and (3). The purpose of providing for substitution of a guardian only "to the extent of his judiciary capacity" is to permit the individual to remain a party in cases in which issues in excess of the guardian's capacity are to be decided.

HISTORY

Amended July 9, 1984, effective September 1, 1984.

Rule 26. General Provisions Governing Discovery.

(a) *Discovery Methods*. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) *Scope of Discovery*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

> (1) *In general*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (2) *Insurance agreements*. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.
>
> (3) *Trial preparation; materials*. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other

recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts*. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, (ii) Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as an expert expected to testify at trial.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at the trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Inadvertent Disclosure*.

(A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

(C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

(D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

(c) *Protective Orders*. Upon motion by a party or by the person from whom discovery is sought, stating that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and Timing of Discovery*. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of Responses*. (1) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. This duty includes, but is not limited to, supplying supplemental information about the identity and location of persons having knowledge of discoverable matters, the identity and location of each person expected to be called as a witness at trial, and the subject matter and substance of any expert witness's testimony.

(2) An additional duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) *Contents of Trial Court Orders for Production of Discovery When Defense to Production is a Privilege or the Opinion-work-product Protection*. When the defense to production of discovery is any privilege recognized by Arkansas law or the opinion-work-product protection, orders pursuant to Rule of Civil Procedure 37 compelling production of discovery or denying a motion to quash production of materials pursuant to Rule 45 shall be supported by factual findings and shall address the following factors:

(1) the need to prevent irreparable injury;

(2) the likelihood that the claim of privilege or protection would be sustained on appeal;

(3) the likelihood that an immediate appeal would delay a scheduled trial date;

(4) the diligence of the parties in seeking or resisting the discovery in the circuit court;

(5) the circuit court's written statement of reasons supporting or opposing immediate review; and

(6) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion.

The Supreme Court may, in its discretion, permit an interlocutory appeal from such orders pursuant to Ark. R. App. P.-Civ. 2(f).

Addition to Reporter's Notes, 2006 Amendment: Subdivision (e) has been amended. The amendment strengthens a party's duty to supplement discovery responses with additional or corrected information received after the party's original response. Introductory language stating a general no-duty-to-supplement rule with exceptions has been eliminated. Former subdivisions (e)(1) and (e)(2) have been combined: there is one duty to amend, and amended responses containing supplemental information are one kind of amendment. Former subdivision (e)(3) has been renumbered as new (e)(2) and clarified. The circuit court or the parties may expand the Rule 26(e) duty to supplement. New subdivision (e) in Arkansas Rule of Civil Procedure 37 contains a companion change: if a party fails to supplement discovery responses seasonably, and prejudice results, then the prejudiced party may move for any appropriate sanction from the circuit court.

Addition to Reporter's Notes, 2007 Amendment: Paragraph (4)(A) of subdivision (b) has been amended to conform the Rule to current practice. Parties routinely depose testifying experts, as they do other witnesses, without first getting a court order allowing the deposition. This amendment eliminates an unnecessary provision that no one was following.

Paragraph (5) has been added to subdivision (b). These provisions protect parties who inadvertently disclose material protected by any evidentiary privilege or doctrine of protection, such as the attorney work product doctrine. This provision draws on the work of the Arkansas Bar Association's Task Force on the Attorney-Client Privilege, American Bar Association

Resolution 120D (adopted by House of Delegates in August 2006), and a 2006 amendment to Federal Rule of Civil Procedure 26. The Arkansas Bar Association specifically endorsed a similar change in the Arkansas Rule, although its proposal was limited to the attorney-client privilege and the work-product doctrine.

Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

Arkansas law on this issue is scarce. In *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 639 S.W.2d 726 (1982), a letter between two lawyers for Firestone "made its way" to one of Firestone's customers, who produced the letter in another lawsuit. The Supreme Court held that Firestone waived the privilege by allowing the letter to get into the customer's hands. 276 Ark. at 519, 639 S.W.2d at 730. The Court, however, did not discuss how the customer obtained the letter or whether Firestone's disclosure was inadvertent. The Eighth Circuit has endorsed the multifactor approach contained in this Rule as amended. *Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996) (predicting in a diversity case that Missouri courts would adopt this approach, which is the majority view).

The new provision creates a presumption against waiver if the disclosing party acts promptly after discovering the inadvertent disclosure. Notice by the disclosing party must be specific about both the material inadvertently disclosed and the privilege or doctrine protecting it. After receiving this kind of notice, a party may neither use nor disclose the specified material. Instead, the receiving party must either return, sequester, or destroy the material (including all copies). A party's failure to fulfill these obligations will expose that party to sanctions under Rule 37. The new provision also creates a procedure for the receiving party to challenge a notice of inadvertent disclosure and a procedure for the circuit court to resolve the dispute. This procedure, which requires the court to consider all the material circumstances, "strikes the appropriate balance" and is "best suited to achieving a fair result." Gray, 86 F.2d at 1484.

Addition to Reporter's Notes, 2012 Amendment: Subdivision (f) is added to correspond with new Ark. R. App. P.–Civil 2(f). That rule of appellate procedure gives the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order under Ark. R. Civ. P. 37 compelling production of materials or information or an order under Ark. R. Civ. P. 45 denying a motion to quash production of materials for which a privilege or opinion-work-product is claimed. To help ensure development of an adequate record for the Supreme Court's consideration of whether to allow an appeal, new Rule 26(f) requires the trial court to make factual findings and address the guideline factors (a) through (f).

Rule 26.1. Electronic Discovery.

(a) *Definitions.* In this rule:

> (1) "Discovery" means the process of providing information in a civil proceeding in the courts of this state pursuant to the Arkansas Rules of Civil Procedure or these rules.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronically stored information" means information that is stored in an electronic medium and is retrievable in perceivable form.

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(b) *Supplemental and optional rule*. This rule is intended to supplement the Arkansas Rules of Civil Procedure, and the Arkansas Rules of Civil Procedure shall govern if there is a conflict between this supplemental rule and the Rules of Civil Procedure. The rule is optional because either the parties must agree that it will apply, or the circuit court must order that it will apply on motion for good cause shown.

(c) *Conference, plan, and report*.

(1) In any proceeding in circuit court, the parties may agree to pursue electronic discovery pursuant to this rule or the court may so order on motion for good cause shown. Any such agreement or motion shall be made within 120 days after the date that the complaint was filed. The court, however, may extend or reopen this period for good cause. Within 30 days of an agreement or order to proceed under this rule, the parties shall confer. At this conference, the parties shall discuss and plan for the following issues:

(A) any issues relating to preservation of discoverable information;

(B) the form in which each type of the information will be produced;

(C) the period within which the information will be produced;

(D) the method for asserting or preserving claims of privilege or of protection of the information such as trial-preparation materials, including the manner in which such claims may be asserted after production;

(E) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;

(F) whether allocation among the parties of the expense of production is appropriate; and,

(G) any other issue relating to the discovery of electronically stored information.

(2) Following the planning conference, the parties shall:

(A) develop a proposed plan relating to discovery of the information; and

(B) not later than 14 days after the conference under subdivision (c)(1), submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(d) *Order governing discovery*.

(1) In a civil proceeding, the court may issue an order governing the discovery of electronically stored information pursuant to:

(A) a motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;

(B) a stipulation of the parties and of any person not a party from which discovery of the information is sought, or

(C) the court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.

(2) An order governing discovery of electronically stored information may address:

(A) whether discovery of information is reasonably likely to be sought in the proceedings;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) the time within which the information is to be produced;

(E) the permissible scope of discovery of the information;

(F) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(G) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(H) allocation of the expense of production; and

(I) any other issue relating to the discovery of the information.

(e) *Limitation on sanctions*. Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.

(f) *Request for production*.

(1) In a civil proceeding, a party may serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test or sample the information.

(2) A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The response must state, with respect to each item or category in the request:

(A) that inspection, copying, testing, or sampling of the information will be permitted as requested; or

(B) any objection to the request and the reasons for the objection.

(g) *Form of production*. Unless the parties otherwise agree or the court otherwise orders:

(1) the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useful;

(2) if necessary, the responding party shall also produce any specialized software, material, or information not ordinarily available so that the requesting party can access and use the information in its ordinarily maintained form; and

(3) a party need not produce the same electronically stored information in more than one form.

(h) *Limitations on discovery*.

(1) A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense.

(2) On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

(3) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(4) If the court orders discovery of electronically stored information under subdivision (h)(3) it may set conditions for discovery of the information, including allocation of the expense of discovery.

(5) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(A) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(B) the discovery sought is unreasonably cumulative or duplicative;

(C) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(D) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(i) *Claim of privilege or protection after production.* A claim of privilege or protection after production of electronic data under these supplemental rules shall be governed by Rule of Civil Procedure (26)(b)(5) unless the application of that rule is modified by agreement of the parties or by order of the court.

(j) *Subpoena for production.*

(1) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena or person acting on the party's request be permitted to inspect, copy, test, or sample the information.

(2) Subject to subsections (j)(3) and (j)(4), subdivisions (g), (h), and (i) apply to a person responding to a subpoena under subsection (j)(1) as if that person were a party.

(3) A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(4) An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance.

Rule 27. Depositions Before Action or Pending Appeal.

(a) *Before Action.*

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court in this state but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and his interest therein; (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service*. The petitioner shall thereafter serve a notice upon each person named in the petition as an adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, the notice shall be served either within or without the state in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17(b) apply.

(3) *Order and Examination*. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition*. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in the courts of this state, it may be used in any action involving the same subject matter subsequently brought in a circuit court of this state in accordance with the provisions of Rule 32(a).

(b) *Pending Appeal*. If an appeal has been taken from a judgment of a circuit court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the circuit court for leave to take the depositions, upon the same notice and service thereof as if the same were pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure of justice, it may make an order allowing the depositions to and may make orders of the character provided for by Rule 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed these rules for depositions taken in actions pending in the circuit court.

(c) *Perpetuation by Action*. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Reporter's Notes to Rule 27: 1. With minor wording changes to accommodate it to state practice, Rule 27 is essentially the same as FRCP 27. It is likewise essentially the same as

superseded Ark. Stat. Ann. § 28-349 (Repl. 1962), and thus works no change in Arkansas practice and procedure.

2. Except under this rule, a person must actually have commenced suit and be involved in litigation before the usual discovery tools are available to him. B & C Tire Co. v. Internal Revenue Service, 376 F. Supp. 708 (D. C. Ala., 1974). This rule in no way determines substantive rights, but merely provides an aid in the eventual adjudication of such rights in an action to be commenced later. *Mosseller v. United States*, 158 F.2d 380 (C.C.A. 2nd, 1946).

Addition to Reporter's Notes, 2001 Amendment: The reference to chancery courts in subdivision (a)(4) has been deleted in light of Constitutional Amendment 80, which established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts. Also, the references to "trial court" in subdivision (b) have been changed to "circuit court" or "court."

HISTORY

Amended May 24, 2001, effective July 1, 2001.

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) *Within this State and Elsewhere in the United States*. Within this state and elsewhere in the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this State or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In Foreign States or Countries*. In a foreign state or country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to any applicable treaty or convention or pursuant to a letter of request, whether or not captioned a letter rogatory. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impractical or inconvenient, and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in (name of the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response

to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *For Use in Foreign Countries*. A party desiring to take a deposition or have a document or other thing produced for examination in this state, for use in a judicial proceeding in a foreign country, may produce to a judge of the circuit court in the county where the witness or person in possession of the document or thing to be examined resides or may be found, letter rogatory, appropriately authenticated, authorizing the taking of such deposition or production of such document or thing on notice duly served; whereupon it shall be the duty of the court to issue a subpoena requiring the witness to attend at a specified time and place for examination. In case of failure of the witness to attend or refusal to be sworn or to testify or to produce the document or thing requested, the court may find the witness in contempt.

(d) *Disqualification for Interest*. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action. Additionally, the officer before whom the deposition is to be taken and the parties, attorneys, or employees shall not:

(1) include the officer on any list of preferred providers of court reporting services after exchanging information and reaching an agreement specifying the prices or other terms upon which future court reporting services will be provided whether or not the services actually are ever ordered; or

(2) take any action to restrict an attorney's choice in the selection of an officer.

Reporter's Notes (as modified by the Court) to Rule 28: 1. Rule 28 is very similar to FRCP 28. This rule is a slightly modified version of superseded Ark. Stat. Ann. § 28-350 (Repl. 1962) which tracked FRCP 28 prior to the 1963 amendments thereto. This rule does not make any appreciable changes in Arkansas law. As a practical matter, anyone authorized by law to administer oaths is qualified to take depositions.

2. Section (c) is a combination of 28 U.S.C. Section 1782 and superseded Ark. Stat. Ann. § 28-346 (Repl. 1962). Nothing in this rule requires that the deposition actually be taken before the court. In this sense the rule may be a departure from the superseded statute.

Addition to Reporter's Note, 1989 Amendment: Rule 28(c) is amended to apply only to the taking of depositions for use in judicial proceedings in foreign countries. Rule 45(f), as amended in 1989, now governs the taking of depositions for use in proceedings in other states.

Addition to Reporter's Notes, 1997 Amendment: This revision, based on a 1993 change in federal Rule 28(b), is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The term "letter of request" has been substituted for "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of a letter of request.

Addition to Reporter's Notes, 2001 Amendment: Subdivision (c) has been amended by deleting the reference in the first sentence to chancery and probate courts. Constitutional Amendment 80 established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

Addition to Reporter's Notes, 2022 Amendment:

Subsection (d) has been amended to identify a process that could compromise the neutrality of the officer before whom the deposition is to be taken. Additional language is also found in Section 22 of the Regulations of the Board of Certified Court Reporter Examiners.

HISTORY

Amended November 20, 1989, effective January 1, 1990; amended November 18, 1996, effective March 1, 1997; amended May 24, 2001, effective July 1, 2001; amended May 12, 2022, effective June 1, 2022.

Rule 29. Stipulations Regarding Discovery Procedures.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like any other depositions; and (2) modify the procedures provided by these rules for other methods of discovery.

Reporter's Notes to Rule 29: -1. Rule 29 is a modified version of FRCP 29. Under the latter, prior court approval must be secured to extend the time to (a) answer interrogatories; (b) produce documents, etc.; or (c) respond to requests for admissions of fact. This prior approval has been rejected by such states as Massachusetts and Arizona when adopting procedural rules patterned after the Federal Rules of Civil Procedure. See Rule 29 of the Massachusetts Rules of Civil Procedure and "Arizona and the Federal Rules" 41 F.R.D. 79 (1966).

2. Agreements between counsel to modify the discovery rules have been commonplace in Arkansas practice. No particular problems have arisen and the notion that prior court approval is necessary was rejected by the Committee. Should agreements of counsel get out of hand, the court has the power under Rule 29 to overrule or reject any stipulation or agreement of counsel. Therefore, any problems which may arise in this area may be corrected by the court on a case by case basis.

3. Prior Arkansas law was found in superseded Ark. Stat. Ann. § 28-351 (Repl. 1962), which was identical to FRCP 29 as it existed prior to its 1970 amendments.

Rule 30. Depositions Upon Oral Examination.

(a) *When Depositions May Be Taken*. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of a witness may be compelled by subpoena as provided in Rule 45, but a subpoena is not necessary if the witness is a party or a person designated under subdivision (b)(6) of this rule to testify on behalf of a party. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of Examination; General Requirements; Special Notice; Method of Recording; Production of Documents and Things; Deposition of Organization*.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff under subdivision (a) if the notice (A) states that the person to be examined is about to go out of this state, or is about to go out of the United States, and will be unavailable for examination unless his deposition is taken before expiration of the 30 day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice and his signature constitutes a certification by him that to the best of his knowledge, information and belief, the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

(3) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes:

(A) the officer's name and business address;

(B) the date, time, and place of the deposition;

(C) the name of the deponent;

(D) the administration of the oath or affirmation to the deponent; and

(E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium.

The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request. The court may on motion, with or without notice, allow a shorter or longer time.

(6) A party may in his notice and in the subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized by these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For purposes of these rules, a deposition by such means is taken at the place where the deponent is to answer questions.

(c) *Examination and Cross-Examination; Record of Examination; Oath; Objections*. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arkansas Rules of Evidence, except Rule 103. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(3) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted

by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on either the party taking the deposition in which event he shall (1) transmit such questions to the office, or (2) directly upon the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Schedule and Duration; Motion to Terminate or Limit Examination*.

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under paragraph (4).

(2) The court may by order limit the time permitted for the conduct of a deposition, but must allow additional time if needed for a fair examination of the deponent or if the deponent or another person impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Review by Witness; Changes; Signing*. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(l) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) *Certification by Officer; Exhibits; Copies; Notice of Filing*.

(1) The officer shall certify that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. The officer shall place the deposition in an envelope or package indorsed with the title of the action and marked 'Deposition of (name of witness)' and, if ordered by the court in which the action is

pending pursuant to Rule 5(c), promptly file it with the clerk of that court. Otherwise, the officer shall send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition if it is to be used at trial.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain, for the period established for transcripts of court proceedings in the retention schedule for official court reporters, stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent; provided that it shall be the duty of the party causing the deposition to be taken to furnish one copy of the transcript, or if the deposition was recorded solely by sound or sound-and-visual as provided for in Rule 30(b)(3), a copy of the recording, to any opposing party, or in the event there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to Attend or to Serve Subpoena; Expenses*.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by an attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by an attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Reporter's Notes to Rule 30: 1. Rule 30 is, with the exception of minor wording changes, the same as FRCP 30. This rule also closely follows superseded Ark. Stat. Ann. § 28-352 (Repl. 1962), which was patterned after FRCP 30 as it existed prior to the series of amendments thereto beginning in 1970.

2. Section (a) is identical to FRCP 30(a). It is comparable to superseded Ark. Stat. Ann. § 28-348 (Repl. 1962), and works no appreciable change in Arkansas law.

3. Section (b)(1) is identical to FRCP 30(b)(1) and substantially follows superseded Ark. Stat. Ann. § 28-352(a) (Repl. 1962). It does not change Arkansas law. Section (b)(2) is revised from FRCP 30(b)(2). The latter, in subpart (A) refers to one who is bound on a voyage at sea whereas this rule is applicable to any person leaving the state or country. There was no comparable provision under prior Arkansas law and this should resolve the question of when an emergency or rush deposition could be taken.

4. Rule 30(b)(3) is identical to FRCP 30(b)(3). Similar language was found in superseded Ark. Stat. Ann. § 28-352(a) (Repl. 1962).

5. Section 30(b)(4) is identical to FRCP 30(b)(4). Under this provision, the court has the discretion to order that a deposition may be taken by other than stenographic means. Under proper safeguards, a deposition may be taken by photographic-sound devices. *Carson v. Burlington Northern, Inc.*, 52 F. R. D. (D.C. Neb., 1971). Superseded Ark. Stat. Ann. § 28-352(c) (Repl. 1962), permitted the parties to agree on some form or method of taking a deposition other than stenographically. Where proper safeguards are made, videotaped depositions are certainly proper.

6. Section 30(b)(5) closely follows FRCP 30(b)(5) and establishes a method whereby a party can request that certain documents and tangible items may be brought to the deposition. The procedure described in Rule 34 is applicable and the deponent may refuse to produce the requested documents in which event the moving party is required to present the matter to the court for a determination of whether the documents or items should have been produced. This rule also permits the court to shorten or extend the time limit set by Rule 34 for responding to the request. To such extent, this rule differs from the Federal Rule.

7. With exception of minor wording changes, Section (c) is identical to FRCP 30(c) and substantially the same as superseded Ark. Stat. Ann. § 28-352(c) (Repl. 1962).

8. Section (d) is identical to FRCP 30(d) and substantially follows superseded Ark. Stat. Ann. § 28-352(e) (Repl. 1962).

9. Section (e) is identical to Section (e) of the Federal Rule and follows closely superseded Ark. Stat. Ann. § 28-352(e). Under this and the Federal Rule, if the deponent has not signed the deposition within 30 days of its submission to him, the officer is directed to sign the deposition and give the reason for the deponent's failure or refusal to sign the deposition.

10. Section 30(f)(1) is identical to FRCP 30(f)(1). Section (f)(2) is, however, reworded from the Federal Rule to delete the requirement that the deposition be filed.

11. Section (g) is identical to FRCP 30(g) and is also substantially the same as superseded Ark. Stat. Ann. § 28-352(g) (Repl. 1962).

Additions to Reporter's Notes, 1984 Amendments: Rule 30(f) is amended to remove references to the filing requirement which no longer exists in view of the change to Rule 5(c). The provision for optional filing as a means of giving access to the deposition to multiple parties

remains, and the provision for notice of filing formerly found in Rule 30(f)(3) is contained in Rule 30(f)(2).

Addition to Reporter's Note, 1986 Amendment: New subsection (b)(7) is based upon the corresponding federal rule. Although depositions by telephone have been available by stipulation under Rule 29, this subsection authorizes that method by order of the court as well. The second sentence of the new subsection, under which the telephone deposition is deemed "taken" at the place where the witness is to answer the questions (rather than the place where the questions are propounded), is necessary as a definitional provision in light of other rules involving the place of a deposition. *See* Rules 37(a)(1), 37(b)(1), and 45(d).

Addition to Reporter's Notes, 1991 Amendment: Under subdivision (c), "[e]vidence objected to shall be taken subject to the objections." Thus, it is generally not proper for a lawyer to instruct a deponent to refuse to answer a question. The 1991 amendment expressly states that such an instruction is impermissible absent exceptional circumstances or a reasonable, good faith assertion of a privilege. In light of the amendment, a contention that the question seeks irrelevant information beyond the scope of discovery under Rule 26(b)(1) is not a basis for instructing the deponent not to answer, unless exceptional circumstances - such as harassment or irrelevant questions that unnecessarily touch on sensitive areas - are present. The 1991 amendment is consistent with case law applying Federal Rule 30(c). *See, e.g*., *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981); *International Union of Electrical, Radio & Machine Workers v. Westinghouse Elec. Corp*., 91 F.R.D. 277 (D.D.C. 1981); *Preyer v. United States Lines, Inc*., 64 F.R.D. 430 (E.D. Pa. 1973).

Addition to Reporter's Notes, 1997 Amendment: The changes that have been made in subdivisions (b)–(f) of this rule track the 1993 amendments to Federal Rule 30 and are designed in part to take into account the use of video and other recording methods. Provisions in the federal rule limiting the number of depositions were not adopted. The last sentence of subdivision (b)(2), which dealt with use of the deposition of a party unable to obtain counsel, has been deleted, and this matter is now covered by Rule 32(a)(3). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel. Under paragraph (3), the party taking the deposition has the choice of the method of recording. Objections to nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court by motion pursuant to Rule 26(c). Other parties may arrange, at their own expense, for the recording of a deposition by a mens in addition to the method designated by the person noticing the deposition. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required if the deposition is later to be offered as evidence at trial under amended Rule 32(c) or on a dispositive motion under Rule 56. Revised paragraph (4) of subdivision (b) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically. Paragraph (7) has been amended to allow the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court. Minor changes have been made in subdivision (c). First, the reference to Rule 43(b) has been replaced with a reference to the Arkansas Rules of Evidence. The examination and cross-examination of a deponent are governed by those rules,

with the exception of Rule 103, which deals with evidentiary rulings. Second, subdivision (c) has been revised to reflect the changes made in subdivision (b) regarding the method by which a deposition is to be recorded. Finally, the provision that dealt with instructing the deponent not to answer has been deleted and moved to subdivision (d)(1). Unlike its federal counterpart, subdivision (c) does not contain an exception from Rule 615 of the Rules of Evidence. By virtue of this exception in the federal rule, other potential witnesses are not automatically excluded from a deposition at a party's request, although the court can order their exclusion via a protective order. Because such an exception is not included in revised subdivision (c), depositions in Arkansas will continue to be subject to Rule 615. The first sentence of subdivision (d)(1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the witness should respond. While objections may, under the revised rule, be made during a deposition, they should ordinarily be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated or cured, such as the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition. The second sentence of subdivision (d)(1) addresses an even more disruptive practice, i.e., instructing the deponent not to answer a question. This provision previously appeared, in slightly different form, in subdivision (c), having been added in 1991. The former language has been retained as to "reasonable, good faith claims of privilege," but new grounds based on the federal rule - to enforce a limitation on evidence imposed by the court and to present a motion under what is now designated as paragraph (3) - have been added. Paragraph (2) of subdivision (d) dispels any doubts regarding the power of the court to limit, by order, the length of a deposition. This provision also expressly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney. Unlike the federal rule, paragraph (2) does not empower a trial court to establish limits on deposition length by local rule, since such rules are not permissible in Arkansas. Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct. Various changes have been made in subdivision (e) to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures from deponents and the return of depositions. Under the revision, pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made. Subdivision (f) has been revised to reflect changes made in subdivision (b) as to the methods by which a deposition may be taken. If the court does not order the deposition to be filed pursuant to Rule 5(c), the reporter can transmit the transcript or recording to the attorney taking the deposition or ordering the transcript or record, who then becomes custodian for the court of the original record of the

deposition. Pursuant to paragraph (2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take it. New language makes clear that the officer must retain a copy of the record or the stenographic notes, unless otherwise ordered by the court or agreed by the parties. The retention period is the same as that specified for transcripts of court proceedings in the record retention schedule for official court reporters in Arkansas.

Addition to Reporter's Notes, 1998 Amendment: As amended in 1997, Rule 30(f)(1) provided that the officer taking the deposition "shall securely seal" it in an envelope or package and either file it with the clerk, if so ordered, or send it to the attorney who arranged for the deposition. The term "seal" could be read as implying that the attorney who received the deposition was obligated to keep it sealed. Such a result was not intended, and Rule 30(f)(1) has been amended to require that the officer "place" the deposition in an envelope. The obligation that the attorney "store it under conditions that will protect it against loss, destruction, tampering, or deterioration" remains unchanged.

Addition to Reporter's Notes, 2003 Amendment: The penultimate sentence of subdivision (a) has been rewritten to expressly provide that a subpoena is not mandatory if the deponent is a party or a person designated under subdivision (b)(6) to testify on behalf of a party. Notice of the deposition is the sole requirement in these circumstances. -Rule 30 of the Federal Rules of Civil Procedure does not explicitly state that a subpoena is unnecessary when the deponent is a party. Under Fed. R. Civ. P. 37(d), however, sanctions may be imposed against a party or person designated to testify on behalf of a party who does not appear at a deposition "after being served with a proper notice." On the basis of this language, which also appears in the corresponding Arkansas rule, the federal courts "have reasoned that notice alone, without subpoena, is sufficient." 8A Wright, Miller & Marcus, *Federal Practice & Procedure* 2107 (1994).

Addition to Reporter's Notes, 2005 Amendments: Rule 30(d) has been amended and its subsections renumbered. For many years, Arkansas Rule 30 has been substantially similar to Federal Rule 30. The 2005 amendments to Rule 30(d) track changes made in 2000 to the Federal Rule and clarify the terms about behavior during depositions. The amendments confirm that the Rule's limitations extend beyond parties to all persons present at a deposition. They also clarify when a privilege may be asserted against a question. Former subsection (2) has been divided into new subsections (2) and (3), and former (3) has been renumbered as (4). *See generally,* Advisory Committee Note, 2000 Amendments to FRCP 30(d). The Federal Rule's presumptive limitation on the duration of any deposition to one seven-hour day has not been incorporated into the Arkansas Rule.

Addition to Reporter's Notes, 2011 Amendment: Subdivision (f)(2) is revised to clarify that a party taking a deposition is not obligated to provide the opposing party or parties a copy of any sound or sound and video recording of the deposition unless no written transcript was made. Since former subdivision (f)(2) required that the party taking the deposition provide the opposing party a copy of the deposition (if multiple parties, to file a copy with the clerk for use by all parties), the rule could have been read as requiring the party taking the deposition to incur the additional expense of providing a copy of the nonstenographic sound or sound and video recording in addition to the written transcript. Under the amendment, a party taking a deposition only by sound or sound and video recording is still obligated to provide the opposing party with

a copy of the deposition or, in a case involving multiple parties to file a copy for use of all opposing parties.

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended March 13, 2003; amended February 10, 2005; amended June 2, 2011, effective July 1, 2011.

Rule 31. Depositions Upon Written Questions.

(a) *Serving Questions; Notice*. (1) Any party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(2) A party must obtain leave of court if the person to be examined is confined in prison or if, without the written stipulation of the parties, a plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery, or if special notice is given as provided in Rule 30(b)(2).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (B) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to Take Responses and Prepare Record*. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e) and (f) to take the testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) *Copies; Notice of Filing*. The party causing the deposition to be taken shall furnish one copy of the deposition to any opposing party, or if there is more than one opposing party, a copy may

be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.

Reporter's Notes to Rule 31: 1. Rule 31 is identical to FRCP 31 and is a revised version of superseded Ark. Stat. Ann. § 28-353(1)(a) through (c) (Repl. 1962). Deleted from the Federal Rule by the 1970 amendments thereto was former section (d) which was a part of this superseded statute. That section provided that the court could make such orders as were necessary for the protection of the parties, including the right to require that the deposition be taken upon oral examination. This provision is not retained in Rule 31 in light of Rule 26(c) which provides that the Court may order that one discovery device be used in place of another.

2. The time limits prescribed in Section (a) are taken from the Federal Rule. Superseded Ark. Stat. Ann. § 28-353(1)(a) (Repl. 1962) was patterned [after] the Federal Rule insofar as time limits are concerned as it existed prior to the 1970 amendments. Overall, this rule should have little effect upon Arkansas practice.

Additions to Reporter's Notes, 1984 Amendments: Rule 31(c) is amended to make it consistent with the amendment to Rule 5(c) making filing of discovery documents optional. The same means of giving access to upon written questions as are found in the amended Rule 30 with respect to depositions upon oral examination are provided in the amendment.

Addition to Reporter's Notes, 1997 Amendment: Subdivision (a) has been divided into four numbered paragraphs. The first two paragraphs make the rule consistent with Rule 30 as to the circumstances under which leave of court is required. Paragraph (3) is the former second paragraph, without substantive change. Paragraph (4) is the former third paragraph, but the total time for developing cross-examination, redirect, and recross questions is reduced from 50 days to 28 days.

HISTORY

Amended July 9, 1984; effective September 1, 1984; amended November 18, 1996, effective March 1, 1997.

Rule 32. Use of Depositions in Court Proceedings.

(a) *Use of Depositions*. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Arkansas Rules of Evidence.
>
> (2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition taken without leave of court pursuant to a notice under Rule 30(b)(2) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days' notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Arkansas Rules of Evidence.

(b) *Objections to Admissibility*. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Form of Presentation*. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. The transcript must be prepared by a certified court reporter from the nonstenographic recording. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) *Effect of Errors and Irregularities in Depositions*.

(1) *As to Notice*. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer*. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition*.

(A) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within | the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to Completion and Return of Deposition*. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such is, or with due diligence might have been ascertained.

Reporter's Notes to Rule 32: 1. With the exception of minor wording changes necessary to adapt FRCP 32 to state practice, Rule 32 is essentially the same as the Federal Rule. This rule tracks Ark. Stat. Ann. §§ 28-348 and 28-354 (Repl. 1962) and does not work any significant changes in Arkansas practice.

2. Section (c) of FRCP 32 was abrogated in 1972 and the Federal Rules of Evidence now control the effect of taking or using depositions in federal courts. This section is also omitted from Rule 32 as the Uniform Rules of Evidence adopted in this State also control on this same question.

Additions to Reporter's Notes, 1984 Amendments: Rule 32(a)(1) is amended to broaden the uses of depositions at trial beyond impeachment by permitting their use for any purpose permitted by the evidence rules.

Addition to Reporter's Note, 1989 Amendment: As initially adopted, the second paragraph of Rule 32(a)(4) provided that a prior action must have been dismissed before depositions taken for use in it could be used in a subsequent action. The 1989 amendment permits the use of a deposition from a prior action to the extent allowed by the Rules of Evidence. The corresponding federal rule was so amended in 1980. In addition, the 1989 amendment eliminates the

requirement that a deposition taken in a prior action must have been filed in order for it to be used in a subsequent action. This change is consistent with Rule 5(c), which, as amended in 1984, does not require that depositions be filed as a matter of course.

Addition to Reporter's Notes, 1997 Amendment: Subdivision (a)(3) has been amended by adding a new paragraph that includes not only the substance of provisions formerly found in Rule 30(b)(2), but also new language dealing with the situation in which a party who receives minimal notice of a deposition is unable to obtain a court ruling on a motion for protective order seeking to delay or change the place of the deposition. Ordinarily, a party does not obtain protection merely by the filing of a motion under Rule 26(c); any such protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days' notice of a deposition can, provided that its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Former subdivision (c) has been redesignated as subdivision (d), without change, and a new subdivision (c) added to reflect the increased opportunities for video and audio recording of depositions under revised Rule 30. Under the new provision, a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise.

Addition to Reporter's Notes, 1998 Amendment: Subdivision (c) requires that the court be furnished with a transcript of any deposition testimony presented at trial in nonstenographic form. It was not clear, however, whether the transcript had to be certified by the officer before whom the deposition was taken. If that were so, the rule would as a practical matter require the presence of a court reporter at video depositions; under Section 9 of the rules providing for certification of court reporters, 'transcripts ... will be accepted only if they are certified by a court reporter who holds a valid certificate under this Rule.' Such a result would be at odds with Rule 30(b), which contemplates depositions taken by nonstenographic means only. Accordingly, a new second sentence has been added to Rule 32(c) making plain that the transcript must be prepared by a certified court reporter from the audio or video tape recording of the deposition, thereby ensuring that the transcript accurately reflects what is on the tape offered at trial.

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended November 20, 1989, effective January 1, 1990; amended November 11, 1991, effective January 1, 1992; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998.

Rule 33. Interrogatories to Parties.

(a) *Availability*. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) *Answers and Objections*. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The party answering interrogatories shall repeat each interrogatory immediately before the answer or objection. The answers are to be signed by the person making them and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, or objections within 30 days after the service of the interrogatories, except that a defendant must serve answers or objections within 30 days after the service of the interrogatories upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; Use at Trial*. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) *Option to Produce Business Records*. Where the answers to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Reporter's Notes (as modified by the Court) to Rule 33: 1. Rule 33 is similar to FRCP 33. Prior Arkansas law was governed by superseded Ark. Stat. Ann. § 28-353 (Repl. 1962) which followed former FRCP 33. Although there are several wording changes from prior statutes, there

is little substantive change. This rules does, however, extend the time for answering or objecting to interrogatories to 30 days or 45 days after service of summons.

2. Omitted from this rule is the language which was contained in superseded Ark. Stat. Ann. § 28-355 (Repl. 1962), which provided that the number of sets of interrogatories was not limited except as may be required to protect a party. These rules do not mention the limiting of interrogatories although it is clear that under Rule 26(a), the court does have discretion to limit the use of discovery techniques. See Wright & Miller, *Federal Practice and Procedure,* Section 2168.

3. Rule 33(b) abolishes right to object to interrogatories because they call for conclusions or opinions. Under this rule, an interrogatory is not objectionable merely because it calls for an opinion, conclusion of law or contention. Wright & Miller, *Federal Practice and Procedure*, Section 2167.

4. Section (c) is intended to relieve a party from those situations where a substantial burden is placed upon the party to search through records and documents for the requested information. Under this rule, the party who propounded the interrogatories may be referred to the books and records by designation and he may be required to expend his own time and effort in seeking the information sought.

Addition to Reporter's Notes, 1982 Amendment: The second sentence of the second paragraph of Rule 33(a) was added.

Additions to Reporter's Notes, 1984 Amendments: Rule 33(a) is amended by changing the fourth sentence in the second paragraph to make it clear that a party responding to interrogatories must do so within 30 days after they are served or 45 days after service of the summons and complaint, whichever period is longer.

Addition to Reporter's Notes, 1992 Amendment: Subdivisions (d) and (e), neither of which was based on the corresponding federal rule, have been deleted. Their elimination should not affect Arkansas practice in any meaningful way, since the subjects they addressed are adequately covered by other rules. See generally D. Newbern, *Arkansas Practice & Procedure* 17-9 (1985).

Subdivision (d) provided that a party who by interrogatory "requests copies of documents to be attached ... may be required to pay the reasonable cost of reproduction of each document." This provision allowed a party to use interrogatories for purposes of document production, despite the fact that Rule 34 specifically governs that discovery device. Under Rule 34, the requesting party may "inspect and copy" documents and must bear the expense of making copies. The party from whom discovery is sought is not required to make copies for the convenience of his opponent. *See* 4A *Moore's Federal Practice* Para. 34.19[2] & [3] (2d ed. 1992).

Under subdivision (e), a court could award costs, including a reasonable attorney's fee, to a party who obtained a protective order on the basis of unnecessary interrogatories propounded by another party. This provision is unnecessary in light of Rules 26(c) and 37, which provide such protection against abusive use of interrogatories.

Addition to Reporter's Notes, 1997 Amendment: Subdivision (a) of the former version of this rule has been divided into two subdivisions, and former subdivisions (b) and (c) have been redesignated as (c) and (d), respectively.

Paragraph (1) of subdivision (b) is based on the former second paragraph of subdivision (a). It emphasizes the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions or parts of questions should not justify a delay in responding to those questions or portions that can be answered within the prescribed time.

Paragraph (2) is taken without change from the former second paragraph of subdivision (a). Paragraph (3) provides, in accordance with the prior version of the rule, that the court may shorten or lengthen the time for responding to interrogatories. New language expressly permits the parties to extend or shorten the response time by written agreement, a modification in discovery procedures that is permissible under Rule 29. Paragraph (4), which is new, makes clear that objections must be specifically justified and that unstated or untimely grounds for objection are ordinarily waived.

Addition to Reporter's Notes, 1999 Amendment: Subdivision (d) has been amended by adding the last sentence. Taken from the corresponding federal rule, this provision makes clear that a party responding to interrogatories by producing business records has the duty to specify, by category and location, the records from which answers to interrogatories can be derived. Without such guidance, the burden of deriving the answers would not be substantially the same for the party serving the interrogatories as for the responding party. A similar requirement has been added to Rule 34(b).

HISTORY

Amended February 22, 1982; amended July 9, 1984, effective September 1, 1984; amended September 28, 1992, effective January 1, 1993; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying,

photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure*.

(1) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

(2) The party upon whom the request has been served shall serve a written response within 30 days after the service of the request, except that a defendant must serve a response within 30 days after the service of the request upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(3) A party who produces documents for inspection shall (A) organize and label them to correspond with the categories in the production request or (B) produce them as kept in the usual course of business if the party seeking discovery can locate and identify the relevant records as readily as can the party who produces the documents.

(c) *Persons Not Parties*. This rule does not preclude an independent action against a person not a party for permission to enter upon land. As provided in Rule 45(b), a person not a party may be compelled to produce documents or tangible things.

Reporter's Notes to Rule 34: 1. Rule 34 is identical to FRCP 34. Prior Arkansas law was governed by superseded Ark. Stat. Ann. 28-356 (Repl. 1962) which tracked FRCP 34 prior to the 1970 amendments thereto. Under prior Arkansas law, a party seeking the production of documents, etc., was required to show good cause and obtain a court order to permit same. Under this and FRCP 34, the party seeking discovery need only serve a request upon opposing counsel. Should the opposition refuse to produce the document or thing requested, the party seeking discovery must move for an order compelling the production of the item. Thus, unless documents are produced by agreement, a hearing is still required.

2. Rule 34 and FRCP 34 omit any reference to privileged matter. Although this particular rule does not specifically preclude the production and inspecting of privileged matters, Rule 26(b)(1) makes it quite clear that matters which are deemed privileged are beyond the scope of discovery.

Addition to Reporter's Notes, 1997 Amendment: The first and second sentences of the second paragraph of Rule 34(b) have been amended to track Rule 33(b)(3). In accordance with the prior version of Rule 34(b), the court may shorten or lengthen the time for responding to requests for production. New language expressly permits the parties to extend or shorten the response time by written agreement, a modification in discovery procedures that is permissible under Rule 29.

Addition to Reporter's Notes, 1999 Amendment: The first and second paragraphs of subdivision (b) have been numbered and a new paragraph (3) added. The fourth sentence of the second paragraph has been amended to require a party who objects to part of a request for production to permit inspection with respect to the unobjectionable portions. The corresponding federal rule was so amended in 1993. A similar requirement for answers to interrogatories appears in Rule 33(b)(1).

The new third paragraph, based on Federal Rule 34(b), provides that a party from whom production is sought must (1) organize and label the documents in accordance with the categories set out in the production request, or (2) produce them as kept in the usual course of business. However, the second option is available only if "the party seeking discovery can locate and identify the relevant documents as readily as can the party who produces them." This requirement is intended to eliminate a problem that has arisen under the federal rule, which appears to give the producing party the right to produce records as kept in the usual course of business even though the party seeking discovery would be forced to sift through a jumble of documents in order to find those that are responsive to the production request. A similar requirement has been added to Rule 33(d), which allows the production of business records in response to interrogatories.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (c) has been amended to reflect the 2010 amendment to Rule 45(b), which allows subpoenas for the production of books, papers, documents, or tangible things without a related appearance at a deposition, hearing, or trial.

HISTORY

Amended November 18, 1996, effective March 1, 1997; amended January 13, 1997, effective March 1, 1997; amended January 28, 1999.

Rule 35. Physical and Mental Examination of Persons.

(a) *Order for Examination*. When the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Examining Physician or Psychologist*.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with all like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request to receive from the party against whom the order is made, a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just and if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule or statute of this state.

(c) *Medical Records*.

(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.

Reporter's Notes to Rule 35: 1. Rule 35 is identical to FRCP 35. Prior Arkansas law was governed by superseded Ark. Stat. Ann. § 28-357 (Repl. 1962) which tracked FRCP 35 prior to its 1970 amendments. This rule does not work any appreciable changes in Arkansas law.

2. FRCP 35 provides that it does not preclude the taking of a deposition or discovery of a medical report in accordance with the provisions of any other rule. Rule 35 follows this and provides that any statute of this State may provide for additional discovery. Specifically, this rule does not affect Ark. Stat. Ann. § 28-607 (Supp. 1975).

Addition to Reporter's Note, 1990 Amendment: New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

Addition to Reporter's Notes, 1997 Amendment: Subdivision (a) has been amended to permit the appointment of psychologists to conduct mental examinations, and subdivision (b) has been revised to reflect this change. As amended, the Arkansas rule is similar to the version of the corresponding federal rule that was in effect from 1988 to 1991. The current federal rule is broader, allowing physical or mental examinations "by a suitably licensed or certified examiner." Because the impact of such an expansive provision at the state level could be considerable, only an incremental step—i.e., permitting mental examinations by psychologists—has been taken at this time, and that step is consistent with Arkansas practice. Under Rule 702 of the Arkansas Rule of Evidence, a psychologist may testify as an expert about the mental condition of a party or other person. *See, e.g*., *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993) (divorce); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978) (child custody). It makes little sense, therefore, to preclude a psychologist from conducting an examination pursuant to Rule 35. Moreover, psychologists are trained to conduct mental examinations, which are a routine, widely accepted part of the practice of psychology in both forensic and non-forensic settings.

The amendment to subdivision (c) imposes a 30-day deadline for responding to a request for an authorization to obtain copies of a party's medical records. A companion change in Rule 37(a) provides for a motion to compel if the authorization is not provided in a timely manner.

Addition to Reporter's Notes, 1998 Amendment: Subdivision (c) has been divided into numbered paragraphs and reorganized. It has been also amended to address an issue on which the Arkansas federal courts have disagreed. *Compare Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd*, 982 F.2d 1255 (8th Cir. 1993), with *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992). Consistent with the result reached in Harlan, the first sentence of paragraph (2) provides that a party or his or her attorney cannot interview or otherwise informally contact another party's treating physician or psychotherapist without that party's consent. This new provision reflects the intent of the original version of the rule, i.e., to limit communications with a party's physician or psychotherapist to the formal discovery process. A corresponding change has been made in Rule 503(d)(3), Ark. R. Evid.

Addition to Reporter's Notes, 2004 Amendment: A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shorted by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

HISTORY

Amended May 13, 1991, effective July 1, 1991; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended January 22, 2004.

Rule 36. Requests for Admission.

(a) *Request for Admission*. A party may serve upon any other party a written request for the admission, for purposes of the pending action, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. However, a defendant shall have 30 days after service of the request or 45 days after he has been served with the summons and complaint to answer, whichever time is longer. These time periods may be shortened or lengthened by the court. If objection is made, the reasons therefor shall be stated. The party answering requests for admissions shall repeat each request immediately before the answer or objection. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

If an attorney for a party to whom requests for admission are addressed signs an answer, his signature shall be deemed his oath as to the correctness of the answer and his specific authority to bind the party on whose behalf he signs.

(b) *Effect of Admission*. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

(c) *Separate Document*. Requests for admissions must be filed in a separate document so titled and shall not be combined with interrogatories, document production requests, or any other material.

Reporter's Notes (as modified by the Court) to Rule 36: 1. Rule 36 is similar to FRCP 36. Prior Arkansas law was found in superseded Ark. Stat. Ann. § 28-358 (Repl. 1962) which tracked the Federal Rule prior to its 1970 amendments. This rule does effect certain changes in Arkansas law. One major change is the extension of time to respond to requests to a full 30 days. Additionally, the rule expands the scope of matters which may be determined through the use of requests to include statements and opinions of fact.

Addition to Reporter's Notes, 1982 Amendment: The fourth sentence of the second paragraph of Rule 36(a) was added.

Addition to Reporter's Notes, 1983 Amendment: The words "or the application of law to fact" have been added in the first sentence of Rule 36(a).

The second paragraph of Rule 36(a) has been amended to permit an attorney to sign, on behalf of his client, a response to a request for admission. The last paragraph of Rule 36(a) has been added to establish the effect of the attorney's signature.

The word "Rule" has been added to the last sentence of the third paragraph of Rule 36(a).

Additions to Reporter's Notes, 1984 Amendments: Rule 36(a) is amended by stating separately the power of the court to shorten or lengthen the response time and by changing the third sentence of the second paragraph to make it clear that a party responding to admissions requests must do so within 30 days after the requests are served or 45 days after service of the summons and complaint, whichever period is longer.

Addition to Reporter's Note, 1986 Amendment: Under new subsection (c), it is impermissible to combine requests for admissions with interrogatories or other discovery devices. The amendment is consistent with the practice followed in the Arkansas federal courts. See Rule 15(e), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas (as amended effective May 1, 1985).

HISTORY

Amended February 22, 1982; amended May 16, 1983; amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992.

Rule 37. Failure to Make Discovery; Sanctions.

(a) *Motion for Order Compelling Discovery*. A party, upon reasonable notice to all parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court*. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the place where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the place where the deposition is being taken.

(2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, or if a party, in response to a request under Rule 35(c), fails to provide an appropriate medical authorization, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) *Evasive or Incomplete Answer or Response*. For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

(4) *Expenses and Sanctions*.

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to Comply with Order*.

(1) *Sanctions by Court in Place Where Deposition Is Taken*. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending*. If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on Failure to Admit*. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the

court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection*. If a party, or an officer, director or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party, fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a statement that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any other order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c).

(e) *Failure to Supplement Responses*. If a party fails to supplement responses seasonably as required by Rule 26(e), and another party suffers prejudice, then upon motion of the prejudiced party made before or at trial, the court may make any order which justice requires to protect the moving party, including but not limited to imposing any sanction allowed by subdivision (b)(2)(A)-(C) of this rule.

(f) *Expenses Against State*. Except to the extent permitted by statute, expenses and fees may not be awarded against the state of Arkansas under this rule.

Reporter's Notes to Rule 37: 1. With the exception of minor wording changes and the omission of Section (e) of FRCP 37, this rule [is] identical in substance to the Federal Rule. Prior Arkansas law was found in Ark. Stat. Ann. § 28-359 (Repl. 1962) which tracked the Federal Rule prior to its 1970 amendments.

2. As under prior Arkansas law, the imposition of sanctions for failure to make discovery rests in the discretion of the trial court. *Diaz v. Southern Drilling Co*., 427 F. 2d 1118 (C.C.A. 5th, 1970); *Marshall v. Ford Motor Company*, 446 F. 2d 712 (C.C.A. 10th, 1971). Overall, this rule should not effect any significant changes in Arkansas practice.

Addition to Reporter's Notes, 1997 Amendment: The major change in this rule appears in paragraph (2) of subdivision (a) and corresponds to an amendment to Rule 26(c). Under paragraph (2), a party moving to compel discovery must state in the motion, subject to Rule II, that it has attempted to resolve the dispute informally before seeking judicial intervention. Another change corresponds to an amendment to Rule 35(c) establishing a 30-day deadline for responding to a request for authorization to obtain medical records. As amended, paragraph (2) provides for a motion to compel if the authorization is not provided in a timely manner. In addition, the last sentence of paragraph (2) has been moved to paragraph (4).

Under revised paragraph (3) of subdivision (a), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for inspection should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions.

Paragraph (4) of subdivision (a) has been divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" has been changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings. Subparagraph (A) has been revised to cover the situation in which information that should have been produced without a motion to compel is produced after the motion is filed but before a hearing. It also provides that a party should not be awarded expenses for filing a motion that could have been avoided by conferring with opposing counsel. Subparagraph (C) has been amended to include the provision formerly contained in subdivision (a)(2) with respect to protective orders and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Under revised subdivision (d), a party seeking discovery via interrogatory or inspection request must make an effort to obtain responses before filing a motion for sanctions. Similar requirements to attempt resolution of discovery disputes without court action appear in revised Rules 26(c) and 37(a)(2).

Addition to Reporter's Notes, 2003 Amendment: In subdivision (b)(2), the word "person" in the first clause has been replaced with "party," thus making the provision consistent with the corresponding federal rule.

Addition to Reporter's Notes, 2006 Amendment: The Rule has been amended by adding a new subdivision (e) and renumbering former subdivision (e) as (f). New subdivision (e) draws on the principles embodied in the 2000 amendment to Federal Rule of Civil Procedure 37, but establishes a different rule. Under this new Arkansas Rule, when a party fails to supplement discovery responses seasonably with new information, and prejudice results, then the prejudiced party may move the circuit court for relief. New subdivision (e) gives the circuit court wide discretion, including imposing any sanction allowed by Arkansas Rule of Civil Procedure 37, in handling any failure to supplement. This new provision works in tandem with the companion change in Arkansas Rule of Civil Procedure 26(e) to strengthen every party's duty to supplement discovery responses promptly.

HISTORY

Amended November 18, 1996, effective March 1, 1997; amended January 13, 1997, effective March 1, 1997; amended March 13, 2003; amended May 25, 2006.

Rule 38. Jury Trial of Right.

(a) *Demand*. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and not later than 20 days prior to the trial date. Such demand may be indorsed upon a pleading of the party.

(b) *Same: Specification of Issues*. In his demand, a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand, or such lesser time as the court may order, may file a demand for trial by jury of any other or all of the issues of fact in the action.

(c) *Waiver*. The failure of a party to file a demand as required by this rule and as required by Rule 5(c) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Reporter's Notes to Rule 38: 1. As does FRCP 38, this rule recognizes the constitutional right to trial by jury. Rule 38 does, however, extend the period of time within which a party must request a jury trial. Under FRCP 38, the demand for jury trial must be made not later than 10 days after service of the last pleading directed to the issue subject to jury trial. Under this rule, demand for trial by jury may be made at any time up to 20 days prior to trial. Under prior Arkansas law, the time for demanding a jury trial was governed by Rule 4(c) of the Uniform Rules for Circuit and Chancery Courts. That rule permitted the trial court to determine whether any of the parties desired a trial by jury. Unless one of the parties affirmatively requested a jury trial within 10 days after being contacted by the court, the right was waived, provided, of course, that no prior demand for jury trial had been made. Thus, a party normally had until just prior to trial to request a jury trial and this procedure has seemingly worked well. For this reason, the Committee did not see the need to fix an earlier time by which demand for jury trial has to be made.

2. Since Rule 18(a) permits the joinder of legal and equitable claims, problems could arise when equitable issues are resolved in circuit court; however, Rule 18(b) permits the trial court to make such orders respecting severance and transfer as may be appropriate and this should cure most potential problems. There may be instances, however, where a circuit judge might be called upon to decide equitable issues in a case where a jury is sitting. In those instances, the court should follow the federal practice of having the jury resolve the legal issues with the court itself resolving the equitable issues. Wright & Miller, *Federal Practice and Procedure*, Sections 2305 and 2306.

3. Under the Federal Rule, demand for a trial by jury is served upon opposing counsel. Under this rule, the demand or request for the jury is filed with the court clerk. The purpose of this

provision is to ensure that the court itself and its administrators will promptly know if a jury is requested.

Addition to Reporter's Notes, 2001: Article 2, Section 7 of the Constitution of 1874 provides, in part, that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy...." Rule 38 sets out the procedure for asserting the right to a jury trial.

Constitutional Amendment 80, which merged courts of law and equity, did not repeal or modify Article 2, Section 7. As a result of the merger, however, the Supreme Court will be required to determine the parameters of the right to trial by jury in the new system. The possible impact is most clearly seen in cases involving legal issues formerly decided in chancery court under the cleanup doctrine. In this situation, the Supreme Court held that a litigant was not deprived of his or her right to trial by jury because that right is limited to cases that would have been decided "at law" in 1874. By virtue of the cleanup doctrine, which was well-established by 1874, legal issues could be decided by the chancellor without a jury. *Colclasure v. Kansas City Life Ins. Co*., 290 Ark. 585, 720 S.W.2d 916 (1986).

In a merged system, the question is whether Article 2, Section 7 requires trial by jury with respect to legal issues which, prior to merger, would have been heard in chancery under the cleanup doctrine. Faced with this question after the merger of law and equity in the federal courts, the U.S. Supreme Court held that in a case involving both legal and equitable issues, the former will ordinarily be tried first to the jury in order to avoid the preclusive effect of an initial decision by the court on the equitable issues. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1958). Federal cases on this point are not binding, because the right to jury trial in state court is governed not by the Seventh Amendment but by state law. *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415 (1996); *Colclasure v. Kansas City Life Ins. Co*., supra.

HISTORY

Amended November 11, 1991, effective January 1, 1992; Reporter's Notes amended May 24, 2001, effective July 1, 2001.

Rule 39. Trial by Jury or by the Court.

(a) *By jury*. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court, upon motion or of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this State.

(b) *By the Court*. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion, may order a trial by a jury of any or all issues.

(c) *Advisory Jury and Trial by Consent*. In all actions not triable of right by a jury, the court upon motion or of its own initiative, may try any issue with an advisory jury or, with the consent of all parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Reporter's Notes to Rule 39: 1. With the exception of minor wording changes in Section (c), Rule 39 is otherwise identical to FRCP 39. The purpose behind this rule is to ensure that when a jury trial has been requested, it will be granted on all issues triable by jury unless the parties thereafter affirmatively waive this right. Under Section (b), the trial court retains discretion to grant a trial by jury even though timely request or demand has not been made.

2. Section (c) authorizes the trial court to submit any issue to an advisory jury where it would otherwise not be triable by jury or, with the consent of all parties, may order that the verdict of such jury shall be binding as if the issues were triable by jury as a matter of right. Superseded Ark. Stat. Ann. § 27-1705 (Repl. 1962) provided that all issues not triable by jury as a matter of right were to be tried by the court, subject to its power to order any issue to be tried by jury, whether at law or in equity. Thus, the trial courts in this State have previously had the inherent right to submit any issue to a jury. This rule would, however, limit the effect of a jury verdict under Section (c) unless all parties consent to a binding effect.

3. Under the circumstances outlined in Section (c), it is possible to have a binding jury verdict in equity proceedings. This is a change in Arkansas law as jury verdicts in chancery court have heretofore been considered as advisory only and not binding upon the court. *Sullivan v. Wilson Mercantile Co.*, 172 Ark. 914, 290 S.W. 938 (1927); *City of Magnolia v. Davies*, 188 Ark. 19, 64 S.W.2d 85 (1933).

HISTORY

Amended November 11, 1991, effective January 1, 1992.

Rule 40. Trial Settings and Continuances.

(a) *Settings*. Cases shall be set for trial at the request of any party after the issues have been joined. The court may assign a trial date, on its own motion, even though neither party has requested a setting. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) *Continuances*. The court may, upon motion and for good cause shown, continue any case previously set for trial.

(c) *Suits in Which Party or Attorney is Member or Officer of Legislature.*

> (1) Any and all proceedings in suits pending in any of the courts of this State in which any attorney for either party to any suit is a member of the Senate or of the House of Representatives or is a Clerk of either branch of the General Assembly, or Lieutenant Governor, while presiding as president of the Senate, and any and all proceedings in suits pending in any of the courts of this State in which any member of the Legislature or Clerk of either branch of the General Assembly, or Lieutenant-Governor, while presiding

as president of the Senate, is a party, shall be stayed for a time not to exceed fifteen (15) days preceding the convening of the General Assembly and not less than thirty (30) days after its adjournment.

(2) Any and all proceedings in suits pending in any of the courts in this State in which any attorney for either party to any suit is a member of the Legislative Council, or the Legislative Audit Committee, or any Joint Interim Committee of the General Assembly, shall be stayed, or reset if scheduled, if said proceeding has been scheduled on any day upon which the Legislative Council, Legislative Audit Committee, or any Joint Interim Committee is meeting, provided, however, that said attorney shall be a member of the Committee, or alternate member attending in place of a regular member, which is meeting, and provided, further, that said attorney shall request the continuance of the Court no less than three (3) days before said proceeding is to commence.

(3) The term "adjournment" as used in subsection (c) shall mean the adjournment without the establishment of a day certain for reconvening, or adjournment or recess to a date more than thirty (30) days in the future.

(4) The provisions of subsection (c) shall be applicable in the case of special or extraordinary sessions of the General Assembly as well as regular sessions.

Reporter's Notes to Rule 40: 1. Rule 40 deviates substantially in its wording from FRCP 40, although the intent of the rule is essentially the same as the Federal Rule. Section (a) basically follows prior Arkansas law as promulgated in Rule 4(a) of the Uniform Rules for Circuit and Chancery Courts. Thus, the method of setting cases for trial in this State will remain unchanged.

2. Section (a) recognizes the practice of giving certain types of cases precedence in the setting of cases for trial. An example of an action which has precedence under Arkansas law is an election contest. Ark. Stat. Ann. § 3-1002 (Repl. 1962).

3. FRCP 40 sets no guidelines for determining when a continuance should be granted. The federal courts have taken the position that the matter of granting or refusing to grant a continuance rests in the discretion of the trial court. *McSurely v. McClellan*, 426 F. 2d 664 (C.C.A. D.C, 1970); *Connell v. Steel Haulers, Inc.*, 455 F. 2d 688 (C.C.A. 8th, 1972). Prior Arkansas law made a continuance mandatory under superseded Ark. Stat. Ann. § 27-1401 (Repl. 1962) when a party was represented by an attorney who was in the legislature and it was in session; otherwise, the matter of continuances rested within the discretion of the trial court. *Baltimore & Ohio Ry. Co. v. McGill Bros. Rice Mill*, 185 Ark. 108, 46 S.W.2d 651 (1932); *Wallace v. Hamilton*, 238 Ark. 406, 382 S.W.2d 363 (1964). Under this rule, a continuance is never mandatory as was previously the case involving a member of the legislature. To this extent, Rule 40 changes Arkansas law.

4. Rule 40 does not require that a motion for continuance be in writing. Neither does it require that notice be afforded to opposing counsel that a continuance is sought. The court can, in its discretion, require such notice and as a practical matter notice, either orally or in writing, should be given to opposing counsel in most instances.

Addition to Reporter's Notes, 1979 Amendment: Section (c) of Rule 40 did not appear in the original version of the Rules of Civil Procedure adopted by the Supreme Court in December 1978 but was added less than two months later. *See In re Rules of Civil Procedure, Rule 40*, 265 Ark. 963 (1979). Thus, this provision was in place when the Rules went into effect on July 1, 1979, although the Reporter's Notes were not modified to reflect its addition. Section (c) is virtually identical to a superseded statute, Ark. Stat. Ann. § 27-1401 (Repl. 1962), as amended by Act 333 of 1979 [now see § 16-63-406].

HISTORY

Amended February 5, 1979

Rule 41. Dismissal of Actions.

(a) *Voluntary Dismissal; Effect Thereof.*

(1) Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

(2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

(3) In any case where a set-off or counterclaim has been previously presented, the defendant shall have the right of proceeding on his claim although the plaintiff may have dismissed his action.

(b) *Involuntary Dismissal*. In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

(c) *Dismissal of Counterclaim, Cross-Claim or Third-Party Claim*. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim or third-party claim.

(d) *Costs of Previously Dismissed Action*. If a plaintiff who has once dismissed an action, or who has suffered an involuntary dismissal in any court, commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. For purposes of this rule, the term "costs" means those items taxable as costs under Rule 54(d)(2).

Reporter's Notes to Rule 41: 1. Rule 41 differs significantly from FRCP 41 and basically follows prior Arkansas law. Under the Federal Rule, a plaintiff has the unqualified right to dismiss his claim without prejudice only until the defendant has filed his answer. Thereafter, court approval is required in order to dismiss without prejudice and the court has discretion to deny such a motion. *Cone v. West Virginia Pulp & Paper Co*., 330 U.S. 212, 67 S. Ct. 752 (1947). Indeed, FRCP 41 was purposely adopted to prevent a plaintiff from taking a voluntary non-suit at any stage of the proceedings and to put the control in the hands of the trial judge. *Ockert v. Union Barge Line Corp*., 190 F. 2d 303 (C.C.A. 3rd, 1951).

2. Section (a) rejects the limitations contained in FRCP 41 and instead follows prior Arkansas law as set forth in superseded Ark. Stat. Ann. § 27-1405 (Repl. 1962), by permitting one voluntary non-suit at any stage of the case prior to its submission to the jury or the court sitting as the fact finder. This Section does recognize, however, that court approval must be obtained in order to dismiss a claim under Rule 23 (d) and Rule 66.

3. Section (a) retains the provisions of superseded Ark. Stat. Ann. § 27-1407 (Repl. 1962), which permitted a defendant to proceed on his set-off or counterclaim even though the plaintiff's claim has been dismissed.

4. Section (b) also marks a significant variation from FRCP 41(b). Under this rule, the trial court has the right to dismiss on its own motion a claim for failure to prosecute the action or failure to comply with these rules or any order of the court. Under the Federal Rule, such dismissal must be on motion of the defendant or other party affected. Also, under FRCP 41, a dismissal by the court under Section (b) is generally with prejudice, whereas under this rule, such a dismissal is without prejudice provided the case has not been previously dismissed in which event the second dismissal is with prejudice. The Federal Rule was rejected for the reason that while it states that an involuntary dismissal is with prejudice, the appellate courts have been quick to find an abuse of discretion on the part of the trial court in dismissing a claim. *Pond v. Braniff Airways, Inc*., 453 F. 2d 347 (C.C.A. 5th, 1972); *Dyotherm Corp. v. Turbo Machine Co*., 392 F. 2d 146 (C.C.A. 3rd, 1968). The Committee believed that the better practice is to make an involuntary non-suit without prejudice, but limit the number of times a case can be dismissed, whether voluntarily or involuntarily.

5. Omitted from Rule 41 is the provision found in FRCP 41(b) relative to dismissals after the completion of plaintiff's case when it is tried without a jury. Rule 50(a) accomplishes the same purpose whether the case is tried with or without a jury. This is the procedure previously followed in Arkansas and it has seemingly worked well.

6. Section (d) goes beyond the language of FRCP 41(d) by expressly permitting the trial court to impose costs or sanctions against a party who has previously had his claim dismissed, whether voluntarily or involuntarily. While the Federal Rule does not expressly confer such power upon the trial court, it has been held that the court does possess such power. *Gainey v. Brotherhood R. & S. S. Clerks*, 34 F.R.D. 8 (D.C. Pa., 1963). This rule is designed to clear any misunderstanding or confusion on this point.

Additions to Reporter's Notes, 1984 Amendments: Rule 41(b) is amended to make specific the time period after which the court must order cause to be shown why the case should not be

dismissed for want of prosecution. While Rule 10 of the Uniform Rules for Circuit and Chancery Courts provided such a dismissal was without prejudice, this rule provides it is with prejudice if it is the second dismissal, whether the previous dismissal was voluntary or involuntary.

Addition to Reporter's Notes, 1999 Amendment: Subdivision (a) has been divided into three numbered paragraphs and revised to reflect case law. In *Blaylock v. Shearson Lehman Brothers, Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997), the Supreme Court noted that it had "long interpreted [Rule 41(a)] as creating an absolute right to a nonsuit prior to submission of the case to the jury or to the court." In the same case, the Court held that "a court order is necessary to grant a nonsuit and the judgment or decree must be entered to be effective."

A new sentence has been added to subdivision (d) defining "costs" as those recoverable under Rule 54(d)(2), a new provision. A definition was deemed advisable in light of continuing confusion as to expenses that can be taxed as costs. *See, e.g., Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994); *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905(1991).

Addition to Reporter's Notes, 2003 Amendment: The reference to "Rule 23(d)" in subdivision (a)(1) has been corrected to read "Rule 23(e)."

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992; amended January 28, 1999; amended March 13, 2003.

Rule 42. Consolidation; Separate Trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

(b) *Separate Trials.* (1) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

> (2) Notwithstanding paragraph (1), all actions tried before a jury in which punitive damages are sought shall, on the motion of any party and if warranted by the evidence, be conducted in a bifurcated trial before the same jury. The jury shall first determine the liability of the defendant or defendants for compensatory damages, the amount of compensatory damages to be awarded, and, at the discretion of the circuit court, the liability of the defendant or defendants for punitive damages. Should it be necessary, the jury will then determine in a separate proceeding, the liability of the defendant or defendants for punitive damages, if that issue was not decided previously, and the amount of punitive damages to be awarded. Evidence of a defendant's financial condition shall not be admitted in the first proceeding unless relevant to an issue other than the amount of punitive damages.

COMMENT

Reporter's Notes to Rule 42: 1. Rule 42 is substantially the same as FRCP 42. Prior Arkansas law concerning consolidation of cases for trial was found in superseded Ark. Stat. Ann. §§ 27-1304 and 27-1305 (Repl. 1962) and little change is effected by this rule. Generally speaking, consolidation of cases is normally permitted for convenience and economy in judicial administration and not to merge claims into a single cause or change parties' rights. *Johnson v. Manhattan R. Co.,* 289 U.S. 479, 53 S. Ct. 721 (1933). The question of whether to order consolidation rests in the sound discretion of the trial court. *United States v. Knauer*, 149 F. 2d 519 (C.C.A. 7th, 1945), *aff'd,* 328 U.S. 654, 66 S. Ct. 1304.

Addition to Reporter's Notes (2015 amendment): New paragraph (2) has been added to subdivision (b), with its original text designated as paragraph (1). In jury trials, paragraph (2) requires a separate trial, on motion of any party, to determine the amount of punitive damages. The circuit court, in the exercise of its discretion, determines whether liability for punitive damages is to be decided in the first or second phase of the bifurcated proceeding. With the adoption of this amendment, Ark. Code Ann. § 16-55-211 is superseded pursuant to Ark. Code Ann. § 16-11-301. Section 16-55-211 required bifurcation of the entire punitive-damages claim on motion of a party, as do statutes elsewhere. *E.g.*, Minn. Stat. Ann. § 549.20(4); S.C Code § 15-32-520. By contrast, other states require a separate trial only as to the amount of punitive damages. *E.g*., Mo. Stat. Ann. § 510.263(1)–(3); Tenn. Code Ann. § 29-39-104(a). The amendment stakes out a middle ground between these approaches; codifies the pre-2003 practice in Arkansas; and, except as to the amount of punitive damages, leaves the extent of bifurcation to the discretion of the circuit court.

HISTORY

Amended February 26, 2015, effective April 1, 2015.

Rule 43. Taking of Testimony.

(a) *Form.* In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, including Rule 88 relating to virtual and blended court proceedings, or as otherwise provided by law.

(b) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(c) *Evidence on Motions.* When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(d) *Interpreters.* The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Reporter's Notes to Rule 43: 1. Prior to the 1975 amendments, FRCP 43 was entitled "Evidence" and provided the basic rule of evidence in civil cases in federal courts. The adoption of the Federal

Rules of Evidence abrogated much of FRCP 43; hence its substantial revision in 1975. By enacting Act 723 of 1976, the Arkansas Legislature adopted the Uniform Rules of Evidence which are identical to the Federal Rules of Evidence insofar as the mode and order of interrogation and presentation of testimony are concerned. Hence, Rule 43 is identical to FRCP 43.

2. Sections (b) and (c) do not work any changes in Arkansas procedure. Superseded Ark. Stat. Ann. § 28-201 (Repl. 1962) permitted the use of affidavits upon motions although inherent in that statute was the right of the trial court to require oral or deposition testimony in lieu of affidavits.

3. Section (d) is identical to FRCP 43(f) and provides for the permissive appointment of an interpreter and the payment of his compensation. Rule 604 of the Uniform Rules of Evidence touches upon the use of interpreters and requires that he be subject to the provisions of the Uniform Rules concerning qualifications as an expert and the administration of an oath or affirmation that he will make a true translation.

Addition to Reporter's Notes, 2005 Amendments: Rule 43(a) has been amended in two ways. Continuing the substantial identity between the Arkansas Rule and FRCP 43, both of these changes mirror 1996 revisions of the Federal Rule. First, the requirement that testimony be taken "orally" has been eliminated. The amendment allows testimony through non-verbal means (i.e., writing, sign language, or computer) from a witness who is unable to speak. Second, a new provision has been added. That provision gives the circuit court discretion to allow testimony in open court from a different location by contemporaneous transmission. Two important requirements must inform that discretion: good cause shown in compelling circumstances and appropriate safeguards.

Because our legal tradition strongly prefers testimony in the fact-finder's presence, the inconvenience to a witness of attending trial will not establish good cause or compelling circumstances. The amended Rule contemplates some unexpected event that makes attendance by the witness very difficult. Examples of such events include an accident, an illness, or the need for an emergency hearing. When the witness's absence can be reasonably anticipated, a deposition should be the preferred method of securing the testimony. See generally, Advisory Committee's Note, 1996 Amendment to FRCP 43(a).

The amended Rule also requires the circuit court to adopt appropriate safeguards when it allows testimony by contemporaneous transmission. Those safeguards should ensure accurate identification of the witness, protect against influence by persons present with the witness, and secure accurate transmission of the testimony.

HISTORY

Amended February 10, 2005; amended May 19, 2022, effective June 1, 2022.

Rule 44. Proof of Official Record.

(a) *Authentication.*

> (1) *Domestic Record.* An official record kept within the United States, or any state, district or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose,

may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record having jurisdiction in the governmental unit in which the record is kept, authenticated by the seal of the court, or by any public officer having a seal of office and having official duties in the governmental unit in which the record is kept, authenticated by the seal of his office.

(2) *Foreign Record*. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication, or copy thereof, attested by a person authorized to make attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certificate or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) *Alternate Method for Certain Domestic and Foreign Records*. The statutes, codes, written laws, executive acts, or legislative or judicial proceedings of any domestic or foreign jurisdiction or governmental unit thereof may also be evidenced by any publication proved to be commonly accepted as proof thereof in the tribunals having jurisdiction in that governmental unit.

(c) *Lack of Record*. A written statement that after diligent search, no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of the rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(d) *Other Proof*. This rule does not prevent the proof of official records or of entry or lack of entry therein by another method authorized by law.

Reporter's Notes to Rule 44: 1. With the exception of minor wording changes, Rule 44 is substantially identical to FRCP 44. These changes are lifted from superseded Ark. Stat. Ann. § 27-2505 (Supp. 1975), which was taken largely from FRCP 44. These changes do not affect the substance of the Federal Rule.

2. In the last sentence of Section (a)(1), the phrase "of the district or political subdivision" which is found in the Federal Rule, is omitted and the phrase "having jurisdiction in the governmental

unit" is inserted in lieu thereof. The effect of this change is to require that the judge making the certificate be the judge of a court which has jurisdiction.

3. Section (b) includes the alternate method of proving certain records previously found in superseded Ark. Stat. Ann. § 27-2505(c) (Supp. 1975). Although this provision is not found in FRCP 44, it has been held that such proof is proper. *United States v. Aluminum Company of America*, 1 F.R.D. 71 (D.C. N.Y., 1939). Also, it should be noted that Rule 902 (5) of the Uniform Rules of Evidence permits the use of official publications without extrinsic evidence of authenticity.

Addition to Reporter's Notes, 1993 Amendment: The changes made in subdivisions (a)(1) and (a)(2) are identical to those made in the corresponding federal rule in 1991. The amendment to subdivision (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States and adds a generic term to describe governments having a relationship with the United States such that their official record should be treated as domestic records.

The amendment to subdivision (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. It does not affect the former practice of attesting the records, but only changes the method of certifying the attestation. *See generally* Comment, 11 *Harv. Int'l L.J.* 476 (1970).

HISTORY

Amended November 8, 1993, effective January 1, 1994.

Rule 44.1. Determination of Foreign Law.

(a) *Notice*. A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this State shall give notice in his pleading or other reasonable written notice.

(b) *Materials to Be Considered*. In determining the law of any jurisdiction or governmental unit thereof outside this State, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.

(c) *Court Decision and Review*. The court, not the jury, shall determine the law of any jurisdiction or governmental unit thereof outside this State. Its determination is subject to review on appeal as a question of law.

Reporter's Notes to Rule 44.1: 1. Rule 44.1 is identical to superseded Ark. Stat. Ann. § 27-2504 (Supp. 1975) and therefore works no changes in Arkansas practice. This rule is substantially the same as FRCP 44.1, but the wording is changed to adapt the rule to state practice. Whereas the Federal Rule is concerned only with the determination of the law of a

foreign country, this rule applies to the law of any governmental unit outside the State of Arkansas.

Rule 45. Subpoena.

(a) *Form and Issuance.* A subpoena issued by the clerk shall be under seal, state the name of the court and the title of the action, and command each person to whom it is directed to appear and give testimony at the time and place therein specified. An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State in which the attorney is counsel of record.

(b) *For Production of Documentary Evidence.* (1) Any subpoena issued pursuant to this rule may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. The subpoena need not be joined with a subpoena to appear for a deposition, hearing, or trial. If a subpoena does not command an appearance, then it must be served by e-mail, facsimile, or hand delivery on all other parties at least three (3) business days before the subpoena is served on the person to whom it is directed. The party issuing a subpoena that does not command an appearance must promptly provide a copy to all other parties of all material produced in response to the subpoena. (2) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive or (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(c) *Service.* A subpoena for a trial or hearing or for a deposition may be served at any place within this State in the manner prescribed in this subdivision. A subpoena for a trial or hearing or for a deposition may be served by the sheriff of the county in which it is to be served, by his deputy, or by any other person who is not a party and is not less than eighteen (18) years of age. Service shall be made by delivering a copy of the subpoena to the person named therein; provided, however, that a subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence. A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

(d) *Subpoena for Trial or Hearing.* At the request of any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. Notice of the subpoena shall be promptly given to all parties in the manner prescribed by Rule 5(b). A witness, regardless of his county of residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a

sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness is provided adequate notice thereof, reservice of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

(e) *Subpoena for Taking Depositions: Place of Examination.* Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of the rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition. A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(f) *Contempt.* When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court at a time and place to be fixed in the warrant, to give testimony and answer for contempt.

COMMENT

Reporter's Notes to Rule 45: 1. Rule 45 contains numerous changes from FRCP 45. These changes are generally designed to continue certain procedures which were provided under superseded Arkansas law. Section (a) provides the mechanics for the issuance of a subpoena and whereas under FRCP 45 a subpoena is issued only by the court clerk, this section retains the authority of officers before whom depositions are taken to issue subpoenas for that purpose under Section (d). Superseded Arkansas law was found in Ark. Stat. Ann. §§ 28-501 et seq. (Repl. 1962), the bulk of which is retained under this rule.

2. Section (b) provides for the issuance of a subpoena duces tecum. Superseded Ark. Stat. Ann. § 28-357 (Repl. 1962) seemed to suggest that only those items which were admissible in evidence were subject to being subpoenaed. However, superseded Ark. Stat. Ann. § 28-540 (Repl. 1962), which was patterned after FRCP 45(b), appeared to make the subpoena just as broad as that under the Federal Rule. The latter provides for the quashing of a subpoena duces tecum only for certain stated grounds and an objection based solely upon the alleged inadmissibility of the items sought is insufficient. *United States v. 691.81 Acres of Land*, 443 F. 2d 461 (C.C.A. 6th, 1971).

3. Section (c) permits any person authorized under Rule 4(c) to serve a summons to also serve a subpoena. Witnesses residing outside the county must receive five days' notice and those within the county three days' notice. Service by telephone is permitted where the witness is to be served in the same county where the trial is to be held. Ark. Stat. Ann. § 28-508 (Repl. 1962) is superseded. The rule essentially incorporates provisions of superseded Ark. Stat. Ann. §§ 28-510 and 28-514. Those statutes obligated a witness to attend a trial when properly served and tendered expenses and fees, and failure to do so authorized the court to hold the witness in contempt or have the witness arrested and brought before the court for contempt proceedings. Subpoenas to be served within three days of trial must be issued with leave of the court.

4. Section (d) also differs significantly from the Federal Rule concerning subpoenas for deposition purposes. Under the latter, the clerk issues the subpoena after formal notice is filed. Under this rule, following superseded Ark. Stat. Ann. § 28-539 (Repl. 1962), the subpoena can be issued by either the court clerk or by an officer authorized to take depositions. The third paragraph of Section (d) is modified from the Federal Rule to provide simply that a witness subpoenaed for purpose of a deposition cannot be required to travel outside the county wherein he resides or transacts his business in order to give the deposition unless ordered to do so by the court.

5. Section (e) permits service of subpoenas throughout the State of Arkansas. It does not, however, attempt to regulate the enforcement of a subpoena which is to be served outside this State. Whether a sister state will honor an Arkansas subpoena depends upon the reciprocity between the two states and ultimately the law of the sister state.

Addition to Reporter's Note, 1986 Amendment: Rule 45(c) is substantially revised. The 1986 amendment changes prior Arkansas practice by permitting any person who is not a party and is not less than 18 years of age to serve a subpoena, thus adopting the federal practice. Moreover, the amended rule permits service of a subpoena by mail in the same manner as service of process under Rule 4(d)(8). The amended rule thus permits an attorney for any party to serve a subpoena by mail, so long as the requirements of Rule 4(d)(8) with respect to restricted delivery, return receipt, etc. are satisfied. The 1986 amendment also eliminates the distinction between witnesses residing in the county of trial and those residing outside the county. All witnesses must be served at least five days prior to trial, unless the court grants leave to allow service within that period, and all must be paid the same attendance fee and travel expenses. These fees, specified in the amended rule, must be paid at the time of trial, a change from the prior practice of requiring payment or tender of the fees at the time of service. Rule 45(c) also now makes plain that re-service of the subpoena is not necessary if a continuance is granted in the matter and the witness is given sufficient notice prior to his attendance. In that situation, the witness would be compelled to attend trial on the new date, and a new subpoena would not be required. Subsection (d) is also amended to make plain that the five-day minimum for service and the attendance and travel fee requirements

apply to subpoenas for taking depositions as well as to subpoenas for appearance at trial. However, there is no change in the requirement that a deposition witness can be deposed only in the county where he resides, is employed, or transacts his business in person, absent a court order.

Addition to Reporter's Notes, 1988 Amendment: Rule 45 is amended in an attempt to refine some changes made in subsections (c) and (d) in 1986. First, language in both subsections requiring payment of the witness fee at the time and place of the trial or deposition has been deleted. Under the amended rule, the witness fee must be paid or tendered when served with the subpoena, as was the case prior to the 1986 amendment. Second, language in both subsections basing the witness fee on the witness' "reasonable expenses for the loss of time based on [his] earnings" has been deleted. Accordingly, the witness fee is a flat $30 per day. The latter change was made because of problems caused by occurrence witnesses who have claimed extremely high fees based on their earnings for a single day. Such highly paid individuals, like all other citizens, have a societal obligation to come forth and give evidence, much as they have an obligation to serve, when called, as jurors. To vary the witness fee to take into account their high salaries would cause obvious difficulties for litigants unable to pay such a fee. Expert witnesses are covered by Rule 26(b)(4)(C).

Addition to Reporter's Note, 1989 Amendment: Rule 45 has undergone several modifications since it became effective in 1979. Because the 1989 amendment rewrites virtually the entire rule, previous Reporter's Notes are superseded and should be consulted only for historical purposes.

1. Subdivision (a) provides the mechanics for the issuance of a subpoena. Subpoenas may now be issued only by the clerk of court. Authority for the issuance of deposition subpoenas by officers before whom depositions may be taken has been eliminated.

2. Subdivision (b) provides for the issuance of a subpoena duces tecum. Except for minor technical corrections, this provision is unchanged.

3. Subdivision (c) governs service of subpoenas and makes clear that any subpoena, for either trial or deposition, may be served anywhere in the state. Moreover, the subdivision expressly provides that service of a subpoena by mail may be made by an attorney of record for either party. Telephone service of subpoenas is limited to sheriffs and their deputies, who may use this method of service with respect to trial subpoenas directed to witnesses who reside in the county where the trial is to be held. In addition, material from former subdivision (c) governing trial subpoenas has been shifted to subdivision (d). Similarly, provisions regarding contempt have been placed under subdivision (g), which specifically addresses that issue.

4. Subdivision (d) applies to subpoenas for trials or hearings. Most of this material appeared in former subdivision (c). However, the revised rule reduces the period required for service of a subpoena prior to trial without leave of court from five to two days; increases the allowance for witness travel to trial to twenty-five cents per mile; clarifies the authority of the party who subpoenas a witness to excuse the witness prior to testimony by the witness; and eliminates an outdated provision authorizing the taking of depositions of witnesses exempt by law from personal attendance at trial. Pursuant to subdivision (c), a subpoena for a witness to appear at a trial or hearing may be served anywhere in the state.

5. Subdivision (e) governs subpoenas for the taking of depositions, including those for the production of documentary evidence. The 1989 amendment eliminates the authority of an officer

authorized to take a deposition to issue subpoenas for depositions. Under the revised procedure, the clerk of court is to issue a subpoena for a deposition upon the request of a party and the filing by that party of a notice of the deposition complying with Rule 30. Consistent with the increase in travel allowance for trial witnesses under subdivision (d), the travel allowance for deposition witnesses is also increased to twenty-five cents per mile. However, although the period of notice to a witness prior to trial has been reduced to two days under subdivision (d), the period of notice to a deposition witness is five business days. In addition, the geographic limits within which a deposition witness is required to attend a deposition have been expanded from the county of the witness' residence to any place within 100 miles of where the witness resides, is employed, or transacts business in person. Pursuant to subdivision (c), a subpoena for a deposition may be served anywhere in the state.

6. Subdivision (f) establishes a procedure for the taking of depositions within the state for use in proceedings pending in other states. In conjunction with the adoption of this provision, Rule 28(c) has been modified to apply only to proceedings pending in foreign countries.

7. Subdivision (g) governs contempt proceedings. It is a condensed version of language that appeared in former subdivision (c), which seemed to apply only to trial subpoenas. This subdivision replaces a more general contempt provision found in former subdivision (f).

Addition to Reporter's Notes, 2000 Amendment: - Subdivision (a) has been amended to permit an attorney admitted to practice in Arkansas, as an officer of the court, to issue subpoenas in Arkansas cases in which he or she is counsel of record. Cross-references to subdivision (a) have also been added to subdivisions (d) and (e) of the rule. This authority does not apply to subpoenas pursuant to subdivision (f), which governs depositions for use in out-of-state proceedings; accordingly, a subpoena under subdivision (f) may be issued only by the clerk. The phrase "admitted to practice" in amended subdivision (a) refers not only to attorneys licensed in Arkansas, but also to those admitted pro hac vice. In 1991, the corresponding federal rule was amended to allow attorneys to issue subpoenas. *See* Rule 45(a)(3), Fed. R. Civ. P. The federal rule expressly provides for sanctions, including lost earnings and reasonable attorneys' fees, against an attorney "responsible for issuance and service of a subpoena" that "impos[es] an undue burden or expense on the person subject to that subpoena." Rule 45(c)(1), Fed. R. Civ. P. While a similar provision has not been added to the Arkansas rule, the courts have inherent authority to sanction attorneys who abuse their power to issue subpoenas.

Addition to Reporter's Notes, [February] 2001 Amendment: Subdivision (b) of the rule has been amended to emphasize that a subpoena duces tecum is permissible only in connection with a deposition, hearing, or trial. This has always been the case under Rule 45, but a clarifying amendment was deemed advisable in light of recent cases in which lawyers have employed subpoenas to obtain documents from non-parties without a deposition. The Supreme Court has not adopted a provision authorizing a subpoena solely to compel a non-party to produce documents or submit to an inspection. Compare Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P. It also appears that some attorneys construed Rule 45 as not only allowing such a subpoena, but permitting one without notice to opposing counsel. Under the amended rule, there is no doubt but that these so-called "stealth subpoenas" are improper and that notice is necessary for any subpoena. If the subpoena is issued in connection with a deposition, subdivisions (e) and (f) expressly require notice of the deposition. Moreover, a new sentence has been added to subdivision (d) requiring that notice

of a subpoena for a trial or hearing "be promptly given to all parties in the manner prescribed by Rule 5(b)."

Addition to Reporter's Notes, [May] 2001 Amendment: Subdivision (f) has been amended by deleting the reference to chancery judges. Constitutional Amendment 80 established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

Addition to Reporter's Notes, 2002 Amendment: The third sentence of subdivision (f) has been amended to expressly provide that a deposition taken for use in an out-of-state proceeding is subject to the Rules of Civil Procedure, as well as to any rule or statute "creating a privilege or immunity from discovery." Previously, this sentence stated only that the Rules applied to subpoenas issued for such depositions. Also, the last sentence of subdivision (f) has been revised to include a specific reference to motions for protective orders made with respect to the deposition pursuant to Rule 26(c). The former version of this sentence mentioned only objections.

The following form for subpoenas is adopted and shall be published in the notes immediately following Rule 45 in the Court Rules volume of the Arkansas Code: [for revised 2010 version of subpoena form, click here]

Addition to Reporter's Notes Regarding Subpoena Form (January 2002): This form was designed for civil cases, including probate and juvenile matters, and should not be used in criminal proceedings. It is based on the form used in the federal courts. *See* Form AO 88, Subpoena in a Civil Case (Rev. 1994), reprinted in 1B Federal Procedural Forms 1:1270 (1999). However, it departs from the federal model as necessary to accommodate differences between the Arkansas Rules of Civil Procedure and the federal rules. -

Rule 45 does not mention the form, but the Supreme Court's order of adoption describes it as "official." *In re Arkansas Rules of Civil Procedure*, 340 Ark. 731, 733 (2000). Although use of an exact reproduction of the form is not mandatory, a subpoena must include all information called for by the form. For example, the second page of the form contains a "notice to persons subject to subpoenas" intended to advise those persons of their rights and duties under Rule 45. A subpoena without this information would be subject to challenge. However, so long as the necessary information is included, use of a "home-grown" document should not be fatal.

Additional information may be included if it is not inconsistent with Rule 45 or the form itself. For instance, a subpoena issued by the clerk might contain the name, address and phone number of the attorney who requested its issuance. Other information can be added in certain spaces on the form. The division in which the case is pending may also be included along with the street address in the box labeled "place of testimony."

On the other hand, modification of the form in such a way that distorts the controlling law or misleads the recipient is impermissible. Under Rule 45(b), for example, a subpoena duces tecum directed to a non-party is permissible only in connection with a deposition, hearing, or trial. Consequently, adding to the form a box to be checked and an accompanying statement to the effect that the recipient is commanded to permit inspection of specified documents at counsel's office on a given date, is not permissible. By contrast, the federal form offers this option, which is available under the federal rules. *See* Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P.

Unless a statute provides a procedure different from that specified in Rule 45, the rule and the form are applicable in probate and juvenile cases. Certain probate matters - such as will contests and adoptions - are "special proceedings" within the meaning of Rule 81(a) and thus excepted from the Rules of Civil Procedure if a statute sets out a different procedure. *E.g.*, *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991). Some juvenile matters may also be special proceedings. *See Kelley v. State*, 191 Ark. 848, 88 S.W.2d 65 (1935). If there is no such statute, then the rules apply. *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999).

There appears to be only one statute that uses the word "subpoena" in connection with probate cases, and it does not conflict with Rule 45. *See* Ark. Code Ann. § 5-2-317(b)(3). By statute, the Rules of Civil Procedure apply to "all proceedings" in juvenile cases "until rules of procedure for juvenile court are developed and in effect, "except as otherwise provided by the juvenile code. Ark. Code Ann. § 9-27-325(f). No such rules have been promulgated, and the only statute dealing with subpoenas in juvenile cases is not inconsistent with Rule 45. See Ark. Code Ann. § 9-27-310(e). Accordingly, the rule and the subpoena form apply in probate and juvenile proceedings.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (b) has been divided into two numbered paragraphs and amended to allow subpoenas solely for the production of books, papers, documents, or tangible things. The official form and notice have been revised to accommodate subpoenas of this type, and a corresponding change has been made in Rule 34.

The amendment eliminates the long-standing requirement under Arkansas law that a subpoena duces tecum had to be joined with a subpoena for a witness to appear at a deposition, trial, or hearing. This requirement did not reflect actual discovery practice, for lawyers routinely cancelled depositions of nonparties who produced requested documents before the deposition date.

In addition, the amendment aligns Rule 45 with its federal counterpart. See Fed. R. Civ. P. 45(a)(1)(C). Unlike the federal rule, however, this rule does not permit a stand-alone subpoena to permit entry on and inspection of land. In that situation, an independent action must be brought against the nonparty to accomplish this discovery. See Ark. R. Civ. P. 34(c).

Revised Rule 45(b) also includes greater protections for other parties than the Federal Rules. A party who subpoenas only documents or things must serve the subpoena on all other parties at least three business days before serving the subpoena on the person in possession of the materials. This requirement will insure pre-production notice to, and an opportunity to object by, all other parties in the case. Moreover, the requesting party must provide a copy to all other parties of all materials—books, papers, documents, or tangible things—produced in response to the subpoena.

Reporter's Notes (2018 Amendments).

Subdivision (f), "Depositions *for Use in Out-of-State Proceedings,"* was deleted and replaced with new Rule 45.1. The last subdivision, *"Contempt,"* was redesignated as (f).

HISTORY

Amended July 1, 1986, effective September 15, 1986; amended December 21, 1987, effective March 14, 1988; amended November 20, 1989, effective January 1, 1990; amended January 27, 2000; amended January 27, 2000, effective March 23, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended

January 24, 2002; amended June 3, 2010, effective July 1, 2010; amended December 7, 2017, effective January 1, 2018.

Rule 45.1. Subpoena for Interstate Depositions and Discovery

(a) *Purpose.* This rule governs depositions and discovery conducted in Arkansas in connection with a civil action pending in another state.

(b) *Definitions.*

(1) "Foreign jurisdiction" means a state other than Arkansas.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition; or

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(c) *Issuance of Subpoena for Interstate Depositions and Discovery.*

(1) To request issuance of a subpoena under this rule, a party must submit a foreign subpoena to the circuit clerk in the county in which discovery is sought to be conducted. A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a circuit clerk, the clerk, in accordance with the court’s procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed. At the time of issuance of the subpoena, the circuit clerk shall not open a case and shall not collect a fee other than that provided by Ark. Code Ann. section 21-6-402(b)(1). Return or proof of service shall not be made to the circuit clerk but to the attorney who requested the subpoena, and he or she shall retain it and furnish a copy to any party or to the deponent upon request.

(3) The person to whom the subpoena is directed may within ten days after the service or on or before the time specified in the subpoena for compliance if such time is less than

ten days, serve upon the attorney causing the subpoena to be issued written objection to the subpoena or discovery sought. If objection is made, the party who requested the subpoena shall not be entitled to proceed with the deposition or discovery except pursuant to an order of the court. Upon an objection, the party who requested the subpoena may move to enforce the subpoena by filing a motion, with notice to the subject of the subpoena, for an order to enforce the subpoena and proceed with discovery. The motion shall be filed with the circuit clerk. Upon the filing of the motion, the circuit clerk shall assign the matter a case number and collect the applicable fee. An application under subdivision (f) of this rule for a protective order or to quash or modify the subpoena shall be filed and heard in this case, and no additional fees shall be assessed.

(4) A subpoena under subdivision (c)(2) of this rule must:

(A) conform to the requirements of Rule 45, including the approved Form of Subpoena and Notice to Person Subject to Subpoenas, but may otherwise incorporate the terms used in the foreign subpoena so long as they conform to these rules; and

(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) *Service of Subpoena.* A subpoena issued under subdivision (c) of this rule must be served in compliance with Rule 45(c).

(e) *Deposition, Production, and Inspection.* Provisions of these rules, including Rule 26.1 (j), Rule 34, and Rule 45 (b) and (e), relating to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things apply to subpoenas issued under subdivision (c) of this rule.

(f) *Application to Court.* An application to the court for a protective order or to enforce, quash, or modify a subpoena issued under subdivision (c) of this rule must comply with these rules, including Rule 26(c), Rule 45(b) and (e), and be submitted to the court in the county in which discovery is to be conducted.

COMMENT

Reporter's Notes (2018): Rule 45 (f), "Depositions for Use in Out-of-State Proceedings," was replaced with new Rule 45.1. This new procedure is based on the Uniform Interstate Depositions and Discovery Act that was adopted by the National Conference of Commissioners of Uniform State Laws in 2007.

Rule 45.1 is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States, but does not extend to include foreign countries.

Arkansas's adoption of the uniform provision does not include section (2)(5)(C) ("permit inspection of premises under the control of the person") in light of Ark. R. Civ. P. 34(c).

The Uniform Law Commission describes the use of the procedure by way of an example in which a case filed in Kansas (the trial state) has a witness to be deposed that lives in Arkansas (the discovery state). A lawyer in the Kansas case will issue a subpoena in Kansas. That lawyer will then prepare an Arkansas subpoena that has the same terms as the Kansas subpoena. The lawyer will present the completed and issued Kansas subpoena and the Arkansas subpoena to the clerk in Arkansas. The Arkansas clerk, upon being given the Kansas subpoena, will then issue the Arkansas subpoena. The Arkansas subpoena will be served on the deponent in accordance with Arkansas law. The advantages of this process are readily apparent. The only documents that need to be presented to the Arkansas clerk are the subpoena issued in the trial state and the draft Arkansas subpoena. There is no requirement to hire local counsel to have the subpoena issued in Arkansas, and there is no need to present the matter to a judge before the subpoena can be issued. In effect, the Arkansas clerk simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent. Nothing in this rule limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state and would presumably be made and ruled on before the deposition subpoena is ever presented to the clerk in Arkansas. The issuance of the Arkansas subpoena invokes Arkansas jurisdiction in order to: enforce the subpoena; quash or modify the subpoena; issue any protective order or resolve any other dispute relating to the subpoena; and impose sanctions. The discovery to be conducted in Arkansas must comply with the laws of Arkansas, which has a significant interest in protecting its residents who become nonparty witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Any application to the Arkansas court relating to the discovery must comply with the law of Arkansas, including Arkansas's law governing lawyers appearing in its courts. This rule does not change existing state rules governing out-of-state lawyers appearing in its courts.

Subsections (c)(2) and (3) address when a case is opened under this rule. In the routine case, a file is not opened, and the only fee charged is the fee under Ark. Code Ann. § 21-6-402(b)(1). In the event, the person to whom the subpoena is directed makes an objection, and the party requesting the subpoena wants to enforce the subpoena, then the party seeking to enforce the subpoena opens a case with the circuit clerk, a case number is assigned, and the applicable filing fee under Ark. Code Ann. § 21-6-403 is assessed.

Rule 46. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Reporter's Notes to Rule 46: 1. Rule 46 is identical to FRCP 46 and to superseded Ark. Stat. Ann. § 27-1762 (Repl. 1962). This rule makes no changes in Arkansas practice and procedure.

Rule 47. Jurors.

(a) *Examination of Jurors*. The Court shall either permit the parties or their attorneys to conduct the examination of prospective jurors or itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

(b) *Alternate Jurors*. The court may direct that not more than two jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the qualifications, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled. The additional peremptory challenge may be used against an alternate juror only and the other peremptory challenges allowed by law shall not be used against an alternate juror.

Reporter's Notes to Rule 47: 1. Section of this rule is identical to FRCP 47(a) and confers upon the trial court broad discretion in the examination of prospective jurors. *Labbee v. Roadway Express, Inc.*, 469 F. 2d 169 (C.C.A. 8th, 1972); *Kiernan v. Van Schaik*, 347 F. 2d 775 (C.C.A. 3rd, 1965). Prior Arkansas law was governed by superseded Ark. Stat. Ann. § 39-226 (Repl. 1962), which likewise left the mode and manner of voir dire to the discretion of the trial court. This discretion did not, however, vest the trial court with arbitrary authority to prohibit voir dire by counsel. *Missouri Pacific Transp. Co. v. Johnson*, 197 Ark. 1129, 126 S.W.2d 931 (1939). In drafting this rule, the Committee intended to vest the trial court with sufficient authority to limit voir dire to a reasonable inquiry, but not to prohibit reasonable voir dire by counsel.

2. Section (b) is substantially the same as FRCP 47(b) as it existed prior to the 1966 amendments. Prior thereto, the Federal Rule limited alternate jurors to one or two in number, whereas the present Federal Rule permits the court to seat as many as six alternates. The Committee doubted the need for more than two alternates in civil cases in this State and in most court facilities there is insufficient room to seat a large number of alternate jurors. Accordingly, the Committee determined that alternate jurors should be limited to two in number.

3. Prior Arkansas law was governed by superseded Ark. Stat. Ann. § 39-232 (Repl. 1962), which provided that not more than three alternate jurors could be called and impanelled. This rule continues the provisions of superseded Ark. Stat. Ann. § 39-234 (Repl. 1962) wherein it provided that one additional peremptory challenge was allowed when alternate jurors were used, but that such additional challenge could be used only against an alternate juror. Thus the only change in Arkansas law effected by Section (b) is the reduction from three to two in the number of alternate jurors which may be used.

Rule 48. Number of Jurors — Verdict.

Where as many as nine out of twelve jurors in a civil case agree upon a verdict, the verdict shall be returned as the verdict of such jury. The parties may, however, stipulate that a jury shall

consist of any number less than twelve and that a verdict or finding of a stated majority thereof shall be taken as the verdict or finding of the jury. In any case where a verdict is less than unanimous, all jurors consenting to such verdict shall sign the same. If the verdict is unanimous, then the foreman only shall sign.

Reporter's Notes to Rule 48: 1. Rule 48 varies substantially from FRCP 48 and instead follows prior Arkansas law. This rule takes into account Amendment 16 to the Arkansas Constitution which permits nine or more jurors to agree upon a verdict. Under the Federal Rule, a unanimous verdict is required in every case unless the parties have agreed otherwise. *Curry v. Moore-McCormick Lines, Inc*., 51 F. R. D. 301 (D.C. N.Y., 1970).

2. Rule 48 goes further than prior Arkansas statutory law by permitting the parties to stipulate that fewer than twelve jurors may try a case and that a stated majority thereof may return a verdict. Under actual prior practice in this State, juries with fewer than twelve members have been quite common. This practice has not been officially sanctioned previously, however.

3. This rule continues the requirement that where the verdict is less than unanimous, those consenting must sign the verdict.

Rule 49. Verdicts and Interrogatories.

(a) *General Verdicts and General Verdicts with Interrogatories*. The court may require a jury to return only a general verdict which pronounces generally upon all the issues, or the court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(b) *Special Verdicts*. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand,

the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(c) *Allocation of Fault*. (1) In an action for personal injury, medical injury, wrongful death, or property damage, the jury shall determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability for the alleged injury, death, or damage to property. However, the jury shall determine the fault of a nonparty only if:

> (A) the claimant entered into a settlement agreement with the nonparty, or a defending party has given notice, as provided in Rule 9(h), that the nonparty was wholly or partially at fault; and
>
> (B) the defending party has carried the burden of establishing a prima facie case of the nonparty's fault.

(2) The jury shall allocate the fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage.

(3) Assessment of the percentage of a nonparty's fault shall be used only for determining the percentage of the parties. A finding of fault shall not subject a nonparty to liability in any action or be introduced as evidence of liability in any action.

COMMENT

Reporter's Notes to Rule 49: 1. Rule 49 is substantially the same as FRCP 49 and to prior Arkansas law as embodied in superseded Ark. Stat. Ann. § 27-1741.1, et seq. (Repl. 1962). Implicit in the Federal Rule is the right of the trial court to use a general verdict; however, it is believed that less confusion and uncertainty will result if the use of general verdicts is expressly permitted in this rule. Hence, superseded Ark. Stat. Ann. § 27-1741.1 (Repl. 1962), is retained in principle in this rule.

2. Section (b) does not specifically consider the possibility of inconsistent answers to interrogatories submitted to the jury; however, the courts do have the power and authority to rectify inconsistent answers, particularly where the inconsistency is due in part to incorrect instructions to the jury. *Stephenson v. College Misericordia,* 376 F. Supp. 1324 (D. C. Pa., 1974). The court can ask the jury to reconsider its verdict in an attempt to remove the inconsistency, *Alston v. West,* 340 F. 2d 856 (C.C.A. 7th, 1965), or order a new trial. *Wright v. Kroeger Corp.,* 422 F. 2d 176 (C.C.A. 5th, 1970).

3. Overall, Rule 49 should have little effect on prior Arkansas practice and procedure as it is essentially the same as the prior law.

Addition to Reporter's Notes, 1983 Amendment: Rule 49(a) is amended by adding all of the words after the first comma in the first sentence and by adding the remaining sentences. The effect is to add to the Rule provisions for a general verdict accompanied by answers to jury interrogatories.

Addition to Reporter's Notes (2014 Amendment): Subdivision (c) implements Ark. Code Ann. §§ 16-61-201 & 16-61-202(c), as amended by Act 1116 of 2013. It is based in part on section 2 of Act 649 of 2003, codified at Ark. Code Ann. § 16-55-202(a), which was invalidated in separation-of-powers grounds in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135. A corresponding change has been made to Rule 52(a), which applies in bench trials. Rule 9(h), cross-referenced paragraph (1)(A), is the sole procedural mechanism for asserting the right to an allocation of nonparty fault created by Ark. Code Ann. § 16-61-202(c).

Paragraph (1) of subdivision (c) provides that, if certain conditions are met, the jury must determine "the fault of *all persons and entities*, including those not made parties, *who may have joint liability or several liability"* for the alleged harm. The italicized language is taken from Ark. Code Ann. § 16-61-201 and is intended to be coextensive with the statute. In tracking the statutory language, the rule is neutral on questions as to its scope, e.g., whether the phrase "may have joint liability or several liability" includes persons or entities who are immune from suit or are beyond the court's jurisdiction.

As states in paragraph (1)(A), the fault of a nonparty will be determined only if the claimant has settled with the nonparty or the defending party has given the notice required by Rule 9(h). Paragraph (1)(B) imposes another condition: "the defending party has carried the burden of establishing a prima facie case of the nonparty's fault." In other words, the defending party must produce sufficient evidence to warrant submission of the case to the jury. *Health Facilities Mgmt. Corp. v. Hughes*, 365 Ark. 237, 244--45, 227 S.W.3d 910, 917 (2006). Placing this burden on the defending party is consistent with Act 649. See Ark. Code Ann. § 16-55-215 (Act 649 does not affect "existing law that provides that the burden of alleging and proving fault is upon the person who seeks to establish fault.").

Paragraph (2) is based on language in former section 16-55-202(a), and paragraph (3) is taken from former section 16-55-202(c)(2) & (3).

HISTORY

Amended May 16, 1983; amended November 8, 1993, effective January 1, 1994; amended August 7, 2014, effective January 1, 2015.

Rule 50. Motion for Directed Verdict and for Judgment Notwithstanding Verdict.

(a) *Motion for Directed Verdict or Dismissal When Made; Effect*. A party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict at the close of all of the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. In nonjury cases a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief. The motion

may also be made at the close of all of the evidence and in every instance the motion shall state the specific grounds therefor.

(b) *Motion for Judgment Notwithstanding the Verdict*.

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

(2) Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for directed verdict. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(3) A motion for a new trial may be joined with a motion for judgment notwithstanding the verdict, or a new trial be prayed in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion*.

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion*. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in

this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

(e) *Appellate Review*. In a jury trial, a party who does not have the burden of proof on a claim or defense must move for a directed verdict based on insufficient evidence at the conclusion of all the evidence to preserve a challenge to the sufficiency of the evidence for appellate review. A party who has the burden of proof on a claim or defense need not make such a motion to challenge on appeal the sufficiency of the evidence supporting a jury verdict adverse to that party. If for any reason the motion is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

HISTORY

Amended May 16, 1983; amended July 9, 1984, effective September 1, 1984; amended December 10, 1990, effective February 1, 1991; amended January 22, 1998; amended January 28, 1999; amended February 10, 2005.

Rule 51. Instructions to Jury; Objection.

At the close of the evidence or at such earlier time as the court may reasonably direct, any party may submit requested jury instructions to the court. The court shall inform counsel of its proposed action upon the requested instructions and also inform counsel of all other instructions it proposes to submit to the jury. The court shall instruct the jury prior to the arguments of counsel. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. Opportunity shall be given to make objections to instructions out of the hearing of the jury.

A mere general objection shall not be sufficient to obtain appellate review of the court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

Reporter's Notes to Rule 51: 1. Rule 51 varies materially from FRCP 51 and instead tracks prior Arkansas law. Article 7, Section 23 of the Arkansas Constitution requires trial judges to declare the law and reduce the charge to writing at the request of either party. There was no specific statutory provision under prior Arkansas law which required that a party's requested jury instructions had to be submitted to the court by a certain time. Many courts adopted local rules specifying such time and this rule will have no effect on such local rules, provided, of course, that the time limit specified therein is reasonable.

2. This rule requires the trial court to inform counsel of the action taken on requested jury instructions and also inform counsel of the instructions which the court intends to submit to the jury. This is to enable counsel to review the instructions to be given and frame such objections thereto as may be desired. Also, this rule continues the prior Arkansas procedure of having jury instructions given prior to the arguments of counsel as provided in superseded Ark. Stat. Ann. § 27-1727 (Repl. 1962).

3. The provisions of this rule concerning objections to instructions are lifted from Rule 13 of the Uniform Rules for Circuit and Chancery Judges [abolished]. Under the Federal Rule, objections may be made at any time prior to the retirement of the jury for deliberations. Under this rule, objections must be made before or at the time the instructions are given.

Addition to Reporter's Notes, 2001 Amendment: The word "trial," which modified "court's" the second paragraph, has been deleted in light of Constitutional Amendment 80, which established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

HISTORY

Amended May 24, 2001, effective July 1, 2001.

Rule 52. Findings by the Court.

(a)(1) *Effect*. If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules.

(2) *Allocation of Fault*.

(A) In an action for personal injury, medical injury, wrongful death, or property damage tried without a jury, the court shall determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability for the alleged injury, death, or damage to property. However, the court shall determine the fault of a nonparty only if:

(i) the claimant entered into a settlement agreement with the nonparty, or a defending party has given notice, as provided in Rule 9(h), I that the nonparty was wholly or partially at fault; and

(ii) the defending party has carried the burden of establishing a prima facie case of the nonparty's fault.

(B) The court shall allocate fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage.

(C) Assessment of the percentage of a nonparty's fault shall be used only for determining the percentage of fault of the parties. A finding of fault shall not subject a nonparty to liability in any action or be introduced as evidence of liability in any action.

(b) *Amendment*.

(1) Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings of fact previously made or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the | court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(2) When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the circuit court an objection to such findings or has made a motion to amend them or a motion for judgment.

COMMENT

Reporter's Notes to Rule 52: 1. Rule 52 is similar to FRCP 52, but it retains prior Arkansas law by which the failure of a party to request special findings of fact by the court amounted to a waiver of that right. *Anderson v. West Bend Co.*, 240 Ark. 519, 400 S.W.2d 495 (1966); *Doup v. Almand*, 212 Ark. 687, 207 S.W.2d 601 (1948).

2. Prior Arkansas law was codified in superseded Ark. Stat. Ann. § 27-1744 (Repl. 1962) which required the trial court to state findings of fact separately from conclusions of law. Where there was any substantial evidence to support the findings of the circuit judge, his decision had to be affirmed on appeal. *Fanning v. Hembree Oil Company*, 245 Ark. 825, 434 S.W.2d 822 (1968). Under this rule, the findings of the trial judge must be affirmed on appeal unless clearly erroneous, which is the same as clearly against the preponderance of the evidence. The rule, however, does not alter the fact that in some cases an issue must be proved by clear and convincing evidence.

3. Section (b) does not appreciably change prior Arkansas law, as it has been commonly understood that courts had the inherent power to amend its findings or make additional findings during term time. *See Vaughn v. Vaughn*, 223 Ark. 934, 270 S.W.2d 915 (1954), although this power was severely restricted after term time to those grounds specified in superseded Ark. Stat. Ann. § 29-506 (Repl. 1962).

4. Under this rule, motions to have the court amend its findings or make additional findings must be filed within ten days after the entry of judgment. This time period cannot be extended by the trial court as provided in Rule 6 herein and in FRCP 6.

Addition to Reporter's Note, 1989 Amendment: Rule 52(a) is amended to make clear that the same standard of appellate review applies, regardless of whether a trial court's findings of fact

are based on oral or documentary evidence. The corresponding federal rule was so amended in 1985. Prior to that amendment, some federal courts had held that a more searching appellate review was appropriate when the trial court's findings were based solely on documentary evidence.

Addition to Reporter's Notes, 1999 Amendment: Subdivision (b) has been divided into two numbered paragraphs. The new third sentence of paragraph (1) makes plain that a pre-judgment motion to amend findings or to make additional findings is permissible. This is so under the corresponding federal rule, but prior Arkansas case law suggested that such a motion was not effective. *See Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997) (motion for new trial). The new fourth sentence provides that a motion to amend findings or for additional findings not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 4(b)(1) of the Rules of Appellate Procedure–Civil but was added here as a reminder to counsel.

Addition to Reporter's Notes, 2001 Amendment: The references to "trial court" in subdivisions (a) and (b)(2) have been replaced with "circuit court." Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate probate and chancery courts.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (a) has been amended to make plain that a request for findings of fact and conclusions of law may be made "at any time prior to entry of judgment." A companion change in subdivision (b)(1) emphasizes that a motion after entry of judgment pursuant to that provision is for a different purpose, i.e., to amend findings "previously made" or to make additional findings. The effect of these changes is to overrule *Apollo Coating RSC, Inc. v. Brookridge Funding Corp.*, 103 S.W.3d 682 (Ark. App. 2003), which held that a motion for findings and conclusions pursuant to Rule 52(a) could be made after entry of judgment.

Addition to Reporter's Notes (2014 Amendment): The text of subdivision (a) has been designated as paragraph (1) and paragraph (2) has been added. The latter implements Ark. Code Ann. §§ 16-61-201 & 16-61-202(c), as amended by Act 1116 of 2013. It is based in part on section 2 of Act 649 of 2003, codified at Ark. Code Ann. § 16-55-202(a), which was invalidated on separation-of-powers grounds in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135. A corresponding change has been made in Rule 49, which applies to jury verdicts. For discussion, see the notes accompanying that rule.

HISTORY

Amended November 20, 1989, effective January 1, 1990; amended January 28, 1999; amended May 24, 2001, effective July 1, 2001; amended January 22, 2004; amended August 7, 2014, effective January 1, 2015.

Rule 53. Masters.

(a) *Appointment and Compensation*. Subject to the limitations contained herein, each court in which an action is pending may appoint a special master therein. As used in this rule, the word "master" includes a referee, an auditor, an examiner, a commissioner and an assessor. The

compensation to be allowed a master shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but, when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. Reference shall be made in only those cases where there is no right to trial by jury or where such right has been waived. Except in matters of account and difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) *Powers*. The order of reference to a master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. The master shall cause a record to be made of the evidence offered and excluded.

(d) *Proceedings*.

(1) *Meetings*. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the master shall set a time and place for the first meeting of the parties or their attorneys to be held within the time specified by the court or otherwise within a reasonable time after receipt of the order of reference. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses*. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear to give evidence, he may be punished as for a contempt and be subject to the consequences, penalties and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts*. When matters of accounting are in issue before the master, he may prescribe the form in which the account shall be submitted and in any proper case may receive or require in evidence a statement by a certified public accountant who is

called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs,

(e) *Report*.

(1) *Contents and Filing*. The master shall prepare a report upon the matters submitted to him by the order of reference, and, if required to make findings of fact and conclusions of law, he shall set them forth in his report. He shall file the report with the clerk of the court and unless directed by the order of reference shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *Effect*. The court shall accept the master's findings of fact unless clearly erroneous. Within 20 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *Stipulation as to Findings*. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) *Draft Report*. Before filing his report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Reporter's Notes to Rule 53: 1. Rule 53 represents a merger of various provisions from FRCP 53 and prior Arkansas law. This rule does, however, contain several changes from federal and Arkansas law. The latter was codified as superseded Ark. Stat. Ann. §§ 27-1801, et seq. (Repl. 1962), and permitted a reference to a master only in courts of equity. Under FRCP 53, both legal and equitable issues may be referred to a master regardless of whether a jury is involved. *In Re Peterson*, 253 U.S. 300, 40 S. Ct. 543 (1920). Under Rule 53, masters may be used in law courts, but only in cases where a jury trial has been waived.

2. Under this rule and under FRCP 53, the use of masters is the exception and should be used only in rare cases. *Arthur Murray, Inc. v. Oliver*, 364 F. 2d 28 (C.C.A. 8th, 1966); *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F. 2d 809 (C.C.A. 7th, 1942). Masters have been used sparingly in Arkansas although equity courts have had the discretionary power to appoint masters in complex accounting matters. *State ex rel. Purcell v. Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969).

3. Section (c) is substantially the same as FRCP 53(c) and defines the powers possessed by a master. These powers may be restricted by the referring court, but generally the master has the

right to conduct hearings as if he were the judge sitting on the case. A record of the proceedings before the master is required under this section whereas the Federal Rule does not require that a record be made unless requested by a party. Superseded Ark. Stat. Ann. § 27-1806 (Repl. 1962) made a record mandatory and this requirement is brought forward in this rule.

4. Section (d) follows the Federal Rule regarding the conduct of the proceedings with the exception of the time limit contained therein. Under the latter, a meeting with the parties on their attorneys must be held within twenty days after the receipt of the referral by the master. Under this rule, the court may specify a time for such meeting and if none is specified, it must be held within a reasonable period of time following the referral.

5. Omitted from Section (e) of Rule 53 is FRCP 53(e)(3). Since masters are limited to non-jury situations under this rule, the federal provision is inapplicable. Otherwise, Section (e) is substantially the same as its federal counterpart. Under (e)(2), the findings of a master are binding upon the court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the court, on the entire evidence is left with the definite and firm conviction that a mistake has been made by the master. *McGraw Edison Co. v. Central Transformer Corp*., 196 F. Supp. 664 (D.C. Ark., 1961); *United States v. 620.98 Acres of Land*, 255 F. Supp. 427 (D.D. Ark., 1966). The substantial evidence rule is not the test. *WRB Corp. v. Geer*, 313 F. 2d 750 (C.C.A. 5th, 1963). Under prior Arkansas law, equity courts were not required to accept the master's report. *Griffin v. Isgrig*, 227 Ark. 931, 302 S.W.2d 777 (1957); *Ferguson v. Rogers*, 129 Ark. 197, 195 S.W. 22 (1917). Thus, this rule modifies prior Arkansas law by making the master's report mandatory unless it is clearly erroneous. Also, under this rule, a party has twenty days within which to make objection to the report which is an increase over the ten days allowed under FRCP 53.

6. Sections (e)(3) and (e)(4) are identical to Sections (e)(4) and (e)(5) of the Federal Rule. Superseded Ark. Stat. Ann. § 27-1813 (Repl. 1962) provided that a reference to a master by consent of the parties did not make the findings any more conclusive. Under this rule, however, where the parties stipulate as to the binding effect of the master's findings, only questions of law may thereafter be considered.

Rule 54. Judgments; Costs.

(a) *Definition; Form*. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties*.

> (1) *Certification of Final Judgment*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court's signature on

the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based:

Rule 54(B) Certificate

With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this _____ day of_____, _____.

_____

Judge

(2) Lack of Certification. Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

(3) Review of Finality. The finality of a judgment, order, or other form of decision containing the certificate required by paragraph (1) of this subdivision may be reviewed only pursuant to a timely notice of appeal filed in accordance with Rule 4, Ark. R. App. P.–Civ.

(4) Retention of Jurisdiction. An appeal of a judgment, order, or other form of decision containing the certificate required by paragraph (1) of this subdivision shall not affect the trial court’s jurisdiction over other claims or parties.

(5) Named but Unserved Defendant. Any claim against a named but unserved defendant, including a "John Doe" defendant, is dismissed by the circuit court’s final judgment or decree.

(c) *Demand for Judgment*. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) *Costs*.

(1) Costs shall be allowed to the prevailing party if the court so directs, unless a statute or rule makes an award mandatory.

(2) (2) Costs taxable under this rule are limited to the following: filing fees and other fees charged by the clerk; fees for service of process and subpoenas; fees for the publication of warning orders and other notices; fees for interpreters appointed under Rule 43; witness fees and mileage allowances as provided in Rule 45; fees of a master appointed pursuant to Rule 53; fees of experts appointed by the court pursuant to Rule 706 of the Arkansas Rules of Evidence; fees of translators appointed by the court pursuant to Rule 1009 of the Arkansas Rules of Evidence; and expenses, excluding attorney's fees, specifically authorized by statute to be taxed as costs.

(e) *Attorneys' Fees*. (1) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion, shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(c) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law, and a judgment shall be set forth in a separate document as provided in Rule 58.

(4) The court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof.

(5) The provisions of subparagraphs (1) through (4) do not apply to claims for fees and expenses as sanctions for violations of these rules. Reporter's Notes to Rule 54: -1. With exception of the changes in Section (c), Rule 54 is otherwise identical to FRCP 54.

2. Under FRCP 54(b), the practice is to wait until all claims have been finally determined before entering judgment on any particular claim. The purpose is to prevent piecemeal appeals while portions of the litigation remain unresolved. There may be situations, however, where a particular claim should be finally determined before the entire case is concluded. Accordingly, the trial court may direct the entry of a final judgment on fewer than all claims involved upon the express determination that there is no good reason for delay. Thus, a party will always know whether a judgment in a Rule 54(b) situation is ripe for appeal. Unless this determination has been made by the trial court, there can be no appeal. Re Pass v. Vreeland, 357 F. 2d 801 (C.C.A. 3rd, 1966); Oak Construction Co. v. Huron Cement Co., 475 F. 2d 1220 (C.C.A. 6th, 1973).

3. Section (c) formulates the standard that except for default judgments, the form of relief and nature of the order are to be determined by what the facts establish as

opposed to what counsel has pleaded. South Falls Corp. v. Rochelle, 329 F. 2d 611 (C.C.A. 5th, 1964); Molnar v. Gulfcoast Transit Co., 371 F. 2d 639 (C.C.A. 5th, 1967). With reference to default judgments, however, the first sentence of Section (c) expressly provides that relief may not be different in kind or amount from that prayed for by the claimant.

4. Section (d) contains the only changes from FRCP 54. It removes the power contained in the Federal Rule for the clerk to tax costs and leaves such power with the trial judge as under prior Arkansas law. Unless otherwise ordered by the trial judge, costs are taxed against the losing party as was the case under superseded Ark. Stat. Ann. 27-2308, 27-2310 and 27-2312 (Repl. 1962).

Addition to Reporter's Note, 1992 Amendment: The first sentence of Rule 54(b) is amended to expressly state the trial court's obligation to make findings of fact with respect to the required determination that there is "no just reason for delay" for the entry of judgment. The amendment reflects the Supreme Court's holding to that effect in *Franklin v. Osca, Inc*., 308 Ark. 409, 825 S.W.2d 812 (1992) (trial court "must factually set forth reasons ... explaining why a hardship or injustice would result if an appeal is not permitted").

Addition to Reporter's Notes, 1994 Amendment: Subdivision (d) of the rule is rewritten for purposes of clarity. No substantive change is intended. The original version of the rule was awkward and led to confusion. *See, e.g*., *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

Addition to Reporter's Notes, 1997 Amendment: New subdivision (e) establishes a procedure for presenting claims for attorney's fees, a frequently recurring form of litigation not initially contemplated by the rules. It is based on federal Rule 54(d)(2), as amended in 1993.

Paragraph (1) makes plain that the subdivision does not apply to attorneys' fees recoverable as an element of damages, as when sought under the terms of a contract. Such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Paragraph (2) provides a deadline for motions for attorneys' fees -14 days after final judgment unless the court or a statute specifies some other time. Prior law did not prescribe any specific time limit on claims for attorneys' fees. *See Marsh & McLennan v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995).

One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate cases to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits.

Filing a motion for fees under subdivision (e) does not affect the finality or appealability of a judgment. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, defer its ruling on the motion, or deny the motion without prejudice and direct under paragraph (2) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing

will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The new subdivision does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees. This material must be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate.

If directed by the court, the moving party is required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action, as required by Rule 23 and similar provisions. This subdivision does not affect the practice in class action cases whereby claims for fees are presented in advance of hearings to consider approval of the proposed settlement, since the court is permitted to require submissions of fee claims in advance of the entry of judgment.

Paragraph (3) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case. The court is expressly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought. On rare occasion, the court may determine that discovery would be useful to the parties. Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to appellate review. To facilitate such review, paragraph (3) requires the court to set forth its findings of fact and conclusions of law. It is anticipated that this explanation will be quite brief in most cases.

Paragraph (4) authorizes the court to refer issues regarding the amount of a fee to a master under Rule 53. This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and difficult computation of damages." Paragraph (5) excludes from this rule the award of fees as sanctions for violations of these rules.

Addition to Reporter's Notes, 1999 Amendment: A new paragraph has been added to subdivision (d) defining the term "costs." A definition was deemed advisable in light of continuing confusion as to expenses that can be taxed as costs. *See, e.g., Wood v. Tyler,* 317 Ark. 319, 877 S.W.2d 582 (1994); *Sutton v. Ryder Truck Rental, Inc*., 305 Ark. 231, 807 S.W.2d 905(1991).

Addition to Reporter's Notes, 2001 Amendment: Rule 54(b) has caused problems for lawyers and judges alike. *See generally* Watkins, *The Mysteries of Rule 54(b)*, 1996 Ark. L. Notes 117. Although subdivision (b) has not been radically altered, the revisions are intended to emphasize

the steps that must be taken to secure immediate appellate review. The subdivision has been divided into four numbered paragraphs, and the most significant change is the trial court's certificate required by paragraph (1). By virtue of paragraph (2), the absence of the certificate means that a final portion of a case involving multiple parties or claims is not immediately appealable. Except for requiring a certificate and setting out its form, paragraph (1) differs little from the first sentence of the prior version of subdivision (b). Similarly, paragraph (2) largely tracks the second sentence but has been amended to refer to the certificate. Paragraphs (3) and (4) are new but do not work any change in the law.

HISTORY

Amended September 28, 1992, effective January 1, 1993; amended December 5, 1994, effective January 15, 1995; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999; amended February 1, 2001.

Rule 55. Default.

(a) *When Entitled*. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court.

(b) *Manner of Entering Judgment*. The party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

(c) *Setting Aside Default Judgments*. The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

(d) *Plaintiffs, Counterclaimants, Cross-claimants*. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *When Presented*. A motion for default judgment may be presented to the court in vacation and at any place in the district or circuit.

(f) *Remand from Federal Court*. No judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or a motion permitted by Rule 12 in the federal court during removal.

Reporter's Notes (as modified by the Court) to Rule 55: 1. Rule 55 varies substantially from FRCP 55 and generally follows prior Arkansas law. This rule permits only the court to enter default judgment as opposed to the federal practice which permits the clerk to enter judgment in certain instances. Since court clerks in Arkansas normally provide only ministerial services, the judicial function of entering default judgments is left to the trial court itself.

2. Section (b) follows prior Arkansas law regarding the entry of a judgment against an infant or incompetent. No judgment by default may be entered against infants or incompetents under this rule whereas a default judgment may be entered under the Federal Rule where a representative has appeared. Also, where any defendant has appeared in an action, three days' notice must be given to him on an application for default judgment.

3. Section (b) also follows superseded Ark. Stat. Ann. § 29-402 (Repl. 1962) which permits the trial court to take evidence or refer to a jury the question of damages or any other issue which the court, in its discretion, determined should be so submitted.

4. Section (c) retains the provision of superseded Ark. Stat. Ann. § 29-401 (Repl. 1962), which permits a default judgment to be set aside for excusable neglect, unavoidable casualty, or other just cause.

5. Section (e) permits a party to apply for a default judgment at any time regardless of whether the court is in vacation and also permits an applicant to move for a default judgment within or without the county where the action is pending so long as the place is inside the overall circuit or chancery district wherein the action is pending.

Addition to Reporter's Note, 1990 Amendment: Rule 55 has been substantially amended to liberalize Arkansas practice regarding default judgments. The revised rule, which reflects a clear preference for deciding cases on the merits rather than on technicalities, is intended to avoid the harsh results that often flowed from the previous version. Because the rule represents a significant break from prior practice, many cases decided under the old rule and the statute from which it was derived will no longer be of precedential value.

Under revised Rule 55(a), the entry of a default judgment is discretionary rather than mandatory. In deciding whether to enter a default judgment, the court should take into account the factors utilized by the federal courts, including: whether the default is largely technical and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in responding; and whether the court would later set aside the default judgment under Rule 55(c).

The standard in amended Rule 55(c) for setting aside a default is taken from Federal Rule of Civil Procedure 60(b), which is made applicable in the default judgment context by Federal Rule 55(c), and should be interpreted in accordance with federal case law. Under former Rule 55(c), a default judgment could be set aside only upon a showing of "excusable neglect, unavoidable casualty, or other just cause." The amended rule, however, adopts a more liberal standard. Under

subdivision (c)(1), for example, a default judgment may be set aside on the basis of "mistake, inadvertence, surprise, or excusable neglect." In addition, subdivision (c)(4) permits the court to set aside a default judgment "for any other reason justifying relief from the operation of the judgment." The amended rule also makes plain that a defendant seeking to set aside a default judgment must show a meritorious defense, unless the judgment is void. This requirement is consistent with federal practice, *see* C. *Wright & A. Miller*, supra 2697, and with Arkansas case law. *E.g.*, *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989). It should also be noted that Rule 55(c) is the exclusive basis for setting aside a default judgment. As amended in 1990, Rule 60 does not apply to default judgments.

New subdivision (f) provides a "grace period" after a case that has been removed to federal court is remanded to the state court. During this period, a default judgment cannot be entered and the defendants "may move or plead as they might have done had the case not been removed."

Addition to Reporter's Notes, 1999 Amendment: Subdivision (a) has been amended by replacing the word "appear" with the word "plead," the terminology used in the corresponding federal rule. This revision, while minor, is intended to eliminate potential confusion stemming from the fact that appearance is also relevant under subdivision (b), which requires notice of a hearing on a motion for default judgment if the party against whom the judgment is sought "has appeared in the action...."

In addition, use of the word "plead" in subdivision (a) indicates that the phrase "otherwise appear" has independent meaning. Arkansas cases suggest that this phrase means the same thing as an appearance, in which case it would be a redundancy. *E.g.*, *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987) (defendant appeared or otherwise defended within meaning of Rule 55(a) by filing motion to dismiss and motion for summary judgment).

Under the federal rule, the phrase "otherwise defend" refers to motions, which by definition are not pleadings. *E.g.*, *Bass v. Hoagland*, 172 F.2d 205 (5thCir.), cert, denied, 338 U.S. 816 (1949). *See also* Ark. R. Civ. P. 7(a) & (b) (distinguishing pleadings and motions). Amended subdivision (a) reflects the dichotomy recognized by the federal courts.

Addition to Reporter's Notes, 2003 Amendment: Subdivision (c)(3) of the rule has been amended by inserting a parenthetical phrase, "whether heretofore denominated intrinsic or extrinsic, after the word "fraud." Although the prior version of the rule was not by its terms limited to extrinsic fraud, the Court of Appeals has construed it in that fashion. *Graves v. Stevison*, 98 S.W.3d 848 (Ark. App. 2003). The amendment has the effect of overturning *Graves* and makes subdivision (c)(3) consistent with Rule 60(c)(4).

Addition to Reporter's Notes, 2004 Amendment: Subdivision (f) has been rewritten to modify and clarify the practice when a case is removed to federal court and then remanded. A corresponding change has been made in Rule 12(a). These amendments are based on a Texas rule, see Tex. R. Civ. P. 237a, and a similar approach has been taken in other states as well.

Under the original version of subdivision (f), a defendant had a 10-day grace period during which file an answer or Rule 12 motion after a removed case was remanded to state court. Even if the defendant had so responded to the complaint while the case was pending in federal court after its removal, he or she was required to file another answer or motion in circuit court to avoid

a default judgment. *See NCS Healthcare v. W.P. Malone, Inc*., 350 Ark. 520, 88 S.W.3d 852 (2002).

Amended Rule 12(a)(3) expands the grace period to 20 days, during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in the state court. By contrast, if the defendant responded to the complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court, within the 20-day period, to avoid such a judgment. *See Laguna Village, Inc. v. Laborers International Union*, 672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co*., 757 N.E.2d 776 (Ohio App. 2001).

Because Arkansas procedural rules differ in some respects from those in the federal courts, however, Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes. See Laguna Village, supra. For example, the plaintiff may move for an order from the circuit court directing the defendant to revise his or her answer to conform to the Arkansas pleading rules. In addition, the "bulk filing" of the federal pleadings and motions in the circuit court will not suffice. Rather, a party relying on a pleading or motion filed in federal court is charged with the responsibility of making the circuit court aware of the filings and must, if challenged, be able to show that the document was served on the other party. *NCS Healthcare, supra*; *Banks, supra*.

HISTORY

Amended December 10, 1990, effective February 1, 1991; amended January 28, 1999; amended October 2, 2003; amended January 22, 2004.

Rule 56. Summary Judgment.

(a) *For Claimant*. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

(b) *For Defending Party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

(c) *Motion and Proceedings Thereon*. (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods. No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise. The court, on its own motion or at the request of a party, may hold a hearing on

the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period.

> (2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.

(d) *Case Not Fully Adjudicated on Motion*. If upon motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required*. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable*. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith*. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney’s fees, and any offending party or attorney may be adjudged guilty of contempt.

Reporter's Notes to Rule 56: 1. Rule 56 is identical to FRCP 56 and also identical to superseded Ark. Stat. Ann. § 29-211 (Repl. 1962) which tracked the Federal Rule. This rule makes no changes in Arkansas law.

Addition to Reporter's Notes, 2001 Amendment: Subdivision (c) of Rule 56 has been divided into two paragraphs, the first of which is new. Paragraph (1) addresses motion and hearing practice under the rule. Other states have adopted similar provisions. *See, e.g.*, Rule 56(c), Ariz. R. Civ. P.; Rule 56(c), Ind. R. Trial P.; Rule 237(c), Iowa R. Civ. P.; Rule 74.04(c), Mo. R. Civ. P. The original version of the rule led to several problems, including last-minute submissions by the party opposing a motion for summary judgment. The rule provided that the opposing party could submit opposing affidavits at any time "prior to the day of the hearing." By contrast, paragraph (1) establishes a time frame for the parties to follow and makes plain that additional submissions are not permissible without leave of court. As under prior practice, a hearing on the motion is not mandatory in all cases. *See Campbell v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993). However, the new time frame effectively precludes the court from ruling on the motion until after the parties have had an opportunity to present their evidence. Corresponding changes have been made in Rules 12(i) and 78(b) to except summary judgment motions from their requirements.

Paragraph (2) provides for partial summary judgment on any issue in the case, including liability. The term "partial summary judgment" has not heretofore been used in the rule but frequently appears in the cases. *See, e.g.*, *City of Russellville v. Banner Real Estate*, 326 Ark. 673, 933 S.W.2d 803 (1996). A similar provision, limited to liability, previously appeared in subdivision (c), and summary judgment on some but not all of the issues is plainly contemplated by subdivision (d).

Addition to Reporter's Notes, 2006 Amendment: Several parts of Rule 56 governing the timing of motions for summary judgment, the related briefing, and the hearing have been amended. These changes continue the effort to refine the Rule by making summary-judgment practice more fair, predictable, and efficient.

The amendments to subdivisions (a) and (b) eliminate a party's right to seek summary judgment at any time. Instead, absent good cause, a party must move at least 45 days before any scheduled trial date. This deadline allows for full briefing and a hearing on the motion before trial, which should promote more efficient use of judicial resources. In addition, it prevents a party from using a late motion for summary judgment as a stealth motion for continuance.

Subdivision (c)(1) has been amended to allow the circuit court to reduce the time periods for responses and replies. Under the former Rule, the court could only enlarge the time periods. Both reductions and enlargements must now be justified by a showing of good cause. Finally, the presumptive period between the due date for any reply and any hearing has been shortened from 14 to 7 days. This change accommodates the pre-trial deadline for filing the motion, while giving the non-moving party adequate time to prepare for the hearing in light of any reply. Revised subdivision (c)(1) also allows the circuit court to shorten the seven-day period for good cause, for example, scheduling difficulties.

HISTORY

Amended February 1, 2001; amended May 25, 2006.

Rule 57. Declaratory Judgments.

The procedure for obtaining a declaratory judgment pursuant to Ark. Code Ann. §§ 16-111-101 through 16-111-111 shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Reporter's Notes to Rule 57: 1. Ark. Stat. Ann. § 34-2501 [now see § 16-111-103], with minor modifications, adopted the Uniform Declaratory Judgment Act. Rule 57 incorporates this statutory enactment by reference and does not effect any significant changes in Arkansas procedure.

2. Prior Arkansas law did not specifically authorize the advancement of declaratory judgment actions on the trial docket. Rule 57 recognizes, however, that some declaratory judgment actions involve matters of public interest and therefore gives the trial court discretion to advance such a case on the trial docket.

HISTORY

Amended November 11, 1991, effective January 1, 1992.

Rule 58. Entry of Judgment or Decree.

Subject to the provisions of Rule 54(b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel. A judgment or decree shall omit or redact confidential information as provided in Rule 5(c)(2).

Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2. Entry of judgment or decree shall not be delayed for the taxing of costs.

Reporter's Notes to Rule 58: 1. Rule 58 varies substantially from FRCP 58 and is designed to incorporate prior Arkansas procedure into a formal rule. Under the Federal Rule, the court clerk, in certain instances, has the responsibility of preparing the formal judgment. In all other instances, the court or the clerk prepares the judgment. This rule recognizes and continues the prior practice in this State of having the prevailing party prepare and submit the form of judgment or decree to the court for its approval.

2. Implicit in this rule is the right of opposing counsel to be afforded an opportunity to approve the form of judgment or decree. Where there is disagreement between the parties as to the form of the judgment or decree, the court should hold a hearing to consider whatever objections there might be. After such a hearing, the court may either enter its own form of judgment or decree; it may enter the form submitted by counsel if the same fairly represents the action of the court or jury or it may require counsel to revise the judgment or decree prepared by counsel. There was no specific statutory authority in Arkansas which governed prior practice in this area and such practice simply developed as an unwritten rule. This rule should have little or no effect on prior practice.

3. The federal practice of having the court prepare the judgment or order is more or less based upon the notion that delays will result if the preparation of judgments and decrees is left to counsel. The Committee did not consider this to be serious enough to warrant changing the longstanding practice in Arkansas of having counsel prepare judgments and decrees. The rule does provide, however, that if counsel is dilatory in the preparation of a judgment or decree, the court can take appropriate action to compel the preparation of the decree or it can prepare it itself.

4. This rule provides that a judgment or decree shall not be effective unless and until it is entered pursuant to Rule 79(a). Thus for appeal purposes, the date of entry or filing of the judgment or decree is the effective date, as opposed to the date of rendition. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955); *Wilhelm v. McLaughlin*, 228 Ark. 582, 309 S.W.2d 203 (1958).

Addition to Reporter's Note, 1990 Amendment: This housekeeping amendment replaced the reference to Rule 79(a) in the second paragraph with a reference to Administrative Order No. 2, which appears in the appendix to the Rules of Civil Procedure. Rule 79 was abolished in 1987 when the administrative order was adopted.

Addition to Reporter's Notes (1999): The second paragraph of this rule provides that a judgment or decree "is effective only when ... set forth [on a separate document] and entered as provided in Administrative Order No. 2." As amended in 1999, Administrative Order No. 2(b) provides that a judgment, decree or order is "entered" when stamped or otherwise marked by the clerk with the time and date and the word "filed," irrespective of when it is recorded in the judgment book. When the clerk's office is not open for business, and upon an express finding of extraordinary circumstances, an order is effective immediately when signed by the judge. Such order must be filed with the clerk on the next day on which the clerk's office is open, and this filing date controls all appeal-related deadlines.

The 1999 amendment to Administrative Order No. 2(b) also requires any clerk's office with a facsimile machine to "accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court." The faxed judgment, decree or order is effective when entered by the clerk. To ensure the permanency of official court records, the original judgment, decree or order must be substituted for the facsimile copy within 14 days of transmission, but this step does not have any bearing on the effectiveness of the faxed document or the time for taking an appeal.

Addition to Reporter's Note, 2008 Amendment: The rule has been amended to reflect Administrative Order 19's requirement that any necessary and relevant confidential information in a case record—a category that includes judgments and decrees—must be redacted. *See* Addition to Reporter's Notes, 2008 Amendment to Rule of Civil Procedure 5.

HISTORY

Amended December 10, 1990, effective February 1, 1991; Amended October 23, 2008, effective January 1, 2009.

Rule 59. New Trials.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have prevented; (4) excessive damages appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small; (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law; (7) newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; (8) error of law occurring at the trial and objected to by the party making the application. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be filed not later than 10 days after the entry of judgment. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(c) *Form of Motion*. The motion must be in writing setting forth in separate paragraphs the grounds or assignments of error relied upon for a new trial. The grounds mentioned in section (a)(2), (3) and (7) of this rule must be supported by affidavits showing their truth and may be controverted in the same manner.

(d) *Time for Filing Affidavits*. When a motion for a new trial is based upon affidavits, they shall be filed with the motion. The opposing party shall have 10 days after service within which to file opposing affidavits which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(e) *On Initiative of Court.* Not later than 10 days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter,

the court may grant a motion for a new trial, timely filed, for a reason not stated in the motion. In either case, the court shall specify in the order the ground therefor.

(f) *Motion for New Trial Not Necessary for Appeal*. A party who has preserved for appeal an error that could be the basis for granting a new trial is not required to make a motion for new trial as a prerequisite for appellate review of that issue.

Reporter's Notes to Rule 59: 1. Rule 59 represents a combination of the provisions found in FRCP 59 and features of prior Arkansas law as codified in superseded Ark. Stat. Ann. §§ 27-1901, et seq. (Repl. 1962). This rule will apply to both legal and equitable causes and in equity court replaces the bill of review which is abolished in Rule 60.

2. FRCP 59 does not define the grounds upon which new trials may be granted. Instead, it simply incorporates by reference those grounds traditionally recognized by the federal courts. Rather than refer to a body of law by reference, Section (a) of this rule specifies the grounds upon which a new trial may be granted. These grounds are lifted from superseded Ark. Stat. Ann. § 27-1901 (Repl. 1962). Thus, no changes are effected in Arkansas law by Section (a). The final sentence of FRCP 59(a) is made a part of this rule so as to permit the granting of similar relief in cases tried without a jury, whether the claims be legal or equitable. This is implicit in superseded Ark. Stat. Ann. § 27-1901 (Repl. 1962), but it is expressly made a part of Rule 59.

3. Section (b) marks a significant departure from prior Arkansas practice. Under this section, a motion for new trial must be filed within ten days after entry or filing of the judgment. Under prior Arkansas law, as codified in superseded Ark. Stat. Ann. § 27-1904 (Repl. 1962), such a motion had to be filed within fifteen days following the verdict or decision, regardless of when the formal judgment or decree was actually filed. *Henderson v. Skerczak*, 247 Ark. 446, 446 S.W.2d 243 (1969); *Peek v. Meadors*, 255 Ark. 347, 500 S.W.2d 333 (1973).

4. Section (c) is not found in FRCP 59 but is practically identical to superseded Ark. Stat. Ann. § 27-1905 (Repl. 1962). The purpose of this provision is to ensure that a motion based upon the grounds set forth in Section (a)(2) and (a)(3) and (a)(7), is supported by affidavit in order to avoid (prevent) groundless or baseless motions from being filed.

5. Section (d) is taken from Section (c) of FRCP 59. The word "served" has been changed to "filed" in keeping with the overall scheme of these rules.

6. Section (e) is identical to Section (d) of FRCP 59. There was no specific provision under prior Arkansas law which gave the trial court the authority to order a new trial on its own initiative although the court may have had the inherent power to do so.

7. Section (f) is identical to FRCP 59(e). There was no comparable provision under prior Arkansas law and its effect is to place motions under Rule 59(f) on the same footing, timewise, with motions for new trials.

Addition to Reporter's Notes, 1982 Amendment: The word "clearly" was added to Rule 59(a)(6).

Addition to Reporter's Notes, 1983 Amendment: Rule 59(f) is deleted. The time within which a trial court may modify, set aside or vacate judgment appears in Rule 60(b).

Addition to Reporter's Notes, 1984 Amendments: Rule 59(f) is added to reinstate the principle of superseded Ark. Stat. Ann. § 27-2127.5 (Repl. 1962). The matter of the necessity of a motion for new trial to preserve error for appeal had not been addressed in these rules.

Addition to Reporter's Notes, 1994 Amendment: The first sentence of subdivision (a) is amended by substituting the word "claim" for the word "issues." The amendment is intended to reflect case law prohibiting a partial new trial on the issue of damages (or the issue of liability), on the theory that a jury's verdict cannot be divided by the court. *E.g., Smith v. Walt Bennett Ford*, 314 Ark. 591, 864 S.W.2d 817 (1993). As amended, subdivision (a) does not allow a partial new trial limited to a given issue. However, it expressly authorizes, in cases involving multiple parties or multiple claims, a partial new trial with respect to a single party or single claim.

Addition to Reporter's Notes, 1999 Amendment: Subdivision (b) has to amended by adding a new second sentence that effectively overturns *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997), which held that a motion for new trial filed before entry of judgment is ineffective. As amended, the rule reflects the practice in the federal courts. The new third sentence provides that a motion for new trial not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 4(b)(1) of the Rules of Appellate Procedure–Civil but was added here as a reminder to counsel.

In addition, the title of the rule has been modified by striking the words "amendment of judgments." A provision in the original version of the rule dealing with this issue was deleted in 1983. *See* Addition to Reporter's Notes, 1983 Amendment.

Addition to Reporter's Notes, 2003 Amendment: Subdivision (f) has been rewritten to reflect the holding in *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996).

HISTORY

Amended May 17, 1982; amended May 16, 1983; amended July 9, 1984, effective September 1, 1984; subsection (a) amended December 5, 1994, effective January 15, 1995; amended January 28, 1999; amended March 13, 2003.

Rule 60. Relief from Judgment, Decree or Order.

(a) *Ninety-Day Limitation*. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

(b) *Exception; Clerical Errors*. Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days*. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

(1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(b), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.

(2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear, upon a motion filed within two years after the filing of the judgment with the clerk of the court, or within one year after a certified copy of the judgment has been served upon the defendant, whichever shall be the earlier, upon security for costs being given; provided notice of the filing of said motion has been served upon the adverse party within the time limitations for filing the motion.

(3) For misprisions of the clerk.

(4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

(5) For erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years, upon a showing of cause.

(d) *Valid Defense to Be Shown*. No judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense.

(e) *Valid Cause of Action to Be Shown*. No judgment, unless it was rendered before the action stood for trial, shall be set aside on the motion of a plaintiff unless the plaintiff makes a prima facie showing of a valid cause of action.

(f) *Defendant Constructively Summoned—Restoration of Property*. When a judgment is set aside on the motion of a defendant constructively summoned, the court may order the plaintiff in the action to restore to the defendant any money of the defendant paid under the judgment or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession and pay to the defendant the value of any property which may have been taken under an

attachment in the action or under the judgment and not restored. The title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by a new trial under subsection (c)(2) of this rule, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

(g) *Exception for Divorce Decrees*. No judgment granting a divorce, except as it relates to alimony, shall be set aside under subsection (c)(2) of this rule.

(h) *Premature Judgment*. Rendering judgment prior to the time fixed for filing an answer shall be deemed a clerical misprision. No misprision of the clerk shall be ground for appeal until relief has been sought in the circuit court and action taken there.

(i) *Motion to Vacate or Modify May Be Heard First*. The circuit court may first try and decide upon the grounds for vacating or modifying a judgment before trying or deciding the validity of the defense or cause of action.

(j) *Injunction Pendente Lite*. The party seeking to vacate or modify a judgment may obtain an injunction suspending proceedings, on the whole or in part, upon showing by affidavit or exhibition of the record that it is probable that he is entitled to have such judgment, decree or order vacated or modified; however, such a showing shall not be required if the judgment, decree or order was rendered before the action stood for trial.

(k) *Independent Action to Set Aside Judgment—Writs Abolished*. A motion under this rule does not affect the finality of a judgment or decree or suspend its operation, except as provided herein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment who was not actually personally served with process or to set aside a judgment or decree for fraud upon the court. Writs of coram nobis in civil cases, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

Reporter's Notes to Rule 60: 1. This rule is substantially different from FRCP 60. Its purpose is to substantially retain existing Arkansas law on the subject. The Court feels that the adoption of FRCP 60 would detract from the stability of final judgments and that the changes which would be made in Arkansas law are highly undesirable. The distinction between intrinsic and extrinsic fraud as a basis for relief from a judgment is considered an important and desirable one.

2. This rule would make the same provision for relatively unlimited control of judgments by circuit courts as that made for chancery courts by Ark. Stat. Ann. §§ 22-406.1 et seq. (Repl. 1962). This makes for uniformity not only as between the two courts but also as among judgments in a particular court, regardless of the time elapsed between entry of the judgment and expiration of a term of court.

3. Under prior Arkansas law, the trial court lost jurisdiction to set aside or modify a judgment after term time except on those grounds specified in superseded Ark. Stat. Ann. § 29-506 (Repl. 1962). *Davis v. McBride*, 247 Ark. 895, 448 S.W.2d 37 (1969); *Hardin v. Hardin*, 237 Ark. 237, 372 S.W.2d 260 (1973). Under prior Arkansas law, the trial court had the power to correct, in certain instances, its judgment even after an appeal had been docketed in the Arkansas Supreme

Court. Superseded Ark. Stat. Ann. § 27-2129.1 (Repl. 1962). Under this rule, however, once the appeal is docketed, a change can be made only with leave of the Supreme Court.

4. In subsection (c)(1) the one year limitation follows the recommendation of the Committee in its proposed Rule 60.

5. Subsection (k) follows Section (b) of FRCP 60 by permitting a court to entertain an independent action to relieve a party from a judgment. *Bankers Mortgage Co. v. United States*, 423 F. 2d 73 (C.C.A. 5th, 1970), *cert. den.*, 90 S. Ct. 2242. Arkansas has previously recognized the power of an equity court to review a judgment from a court of law, although such power is severely limited. *Cotton v. Hamblin*, 233 Ark. 65, 342 S.W.2d 478 (1961).

6. Section (k) provides for the abolition of writs of error and bills of review. While these have not been common under prior Arkansas law, they have been permitted under Article 7, Section 4, of the Arkansas Constitution. However, any relief which could be granted by a court of equity under a bill of review can also be afforded under this rule; hence, it should have little effect on Arkansas practice and procedure.

Additions to Reporter's Notes, 1984 Amendments: Rule 60(b) is modified to remove the references to the law prior to January 1, 1970, and to replace it with language from cases describing the broad power of a court to modify or set aside its judgment during the term of court in which it was entered. *See Karoley v. A.R. & T. Electronics*, 235 Ark. 609, 363 S.W.2d 120 (1962) and the cases cited in that opinion.

Rule 60(c)(5) is amended to remove "married women" from the classes of persons to which the Rule applies.

The caption of the Rule is amended to include "Modification."

Addition to Reporter's Note, 1990 Amendment: Rule 60 has been amended to eliminate any overlap with Rule 55. Under former subdivision (c)(7) of Rule 60, a trial court could set aside a judgment "[f]or unavoidable casualty or misfortune preventing the party from appearing or defending." The 1990 amendment deletes this provision, which has been cited in default judgment cases. *E.g.*, *McGee v. Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982). Moreover, the new opening language of paragraph (c) specifically states that Rule 60 does not apply to default judgments, "which may be set aside in accordance with Rule 55(c)."

Addition to Reporter's Notes, 2000 Amendment: Subdivisions (a) and (b) of the rule have been revised in response to case law. In addition, subdivision (c) has been amended by changing the cross-reference in paragraph (1) from Rule 59(c) to Rule 59(b), and by revising paragraph (4).

As originally adopted, subdivision (a) provided that the trial court could "at any time" correct clerical mistakes and errors "arising from oversight or omission." Under subdivision (b), the trial court could "correct any error or mistake or to prevent the miscarriage of justice" by modifying or setting aside a judgment, decree or order within 90 days of its having been filed with the clerk. Despite this apparent dichotomy, the Supreme Court held that the 90-day limitation in subdivision (b) also applied to subdivision (a). *See, e.g., Ross v. Southern Farm Bureau Cas. Ins.*

Co., 333 Ark. 227, 968 S.W.2d 622(1998); *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923(1991). The Supreme Court subsequently held in *Lord v. Mazzanti*, 335 Ark 25, 2 S.W.3d 76 (1999), that "clerical mistakes" under subdivision (a) can be corrected at any time and overruled any language to the contrary in Phillips and Ross.

This amendment is consistent with *Lord v. Mazzanti*, *supra*. As amended, subdivision (a) is a slightly modified version of former subdivision (b). It states the general rule that the court may, with prior notice to all parties, modify a judgment, decree or order within 90 days of its filing with the clerk to "correct errors or mistakes or to prevent the miscarriage of justice." Revised subdivision (b) expressly states an exception for "clerical mistakes" and errors "arising from oversight or omission," which may be corrected at any time with prior notice to all parties.

Amended paragraph (4) of subdivision (c) allows a judgment, decree or order to be modified or set aside "[f]or misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." This language, taken in part from Rule 60(b)(3) of the Federal Rules of Civil Procedure, eliminates the distinction between intrinsic and extrinsic fraud, a distinction that has been described as "shadowy, uncertain, and somewhat arbitrary." *Howard v. Scott,* 125 S.W. 1158, 1166 (Mo. 1909); *see also* C. Wright & A. Miller, *Federal Practice & Procedure* 2861 (1995) (distinction is "very troublesome and unsound").

Under the prior rule, only extrinsic fraud was a ground for setting aside or modifying a judgment. This has resulted in unfairness. *See, e.g., Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998) (husband's concealment of bank account from wife during negotiations leading to property settlement in divorce action was not extrinsic fraud); *Office of Child Support Enforcement v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998) (mother's failure to mention in affidavit filed in paternity case that a man other than defendant could have been the father of her child was not extrinsic fraud*); Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998) (conduct of attorney in preparing precedent containing findings not made by the court and mailing it to the judge with a letter requesting that he sign the order if no objection was received from opposing counsel did not constitute extrinsic fraud).

Addition to Reporter's Notes, 2001 Amendment: The references to "trial court" in subdivisions (h) and (i) have been replaced with "circuit court." Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended December 10, 1990, effective February 1, 1991; amended January 27, 2000; amended May 24, 2001, effective July 1, 2001.

Rule 61. Harmless Error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court

inconsistent with substantial justice. The court at every stage of the proceeding must; disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Reporter's Notes to Rule 61: 1. Rule 61 is identical to FRCP 61. The philosophy behind this rule is that proceedings should not be disturbed because of a technical error which resulted in no prejudice. *Gutshall v. Wood,* 123 F.2d 174 (C.A., 1942). While there is no corollary under prior Arkansas law, this rule does appear to express the Arkansas attitude towards harmless error.

2. The first paragraph of superseded Ark. Stat. Ann. § 27-1901 (Repl. 1962) relative to new trials provided that a verdict or decision could be vacated and a new trial granted for the grounds stated therein which materially affected the substantial rights of the party. Implicit in that statute was the requirement that the error be prejudicial in order to justify the granting of a new trial. Also, Rule 103(a) of the Federal Rules of Evidence and of the Uniform Rules of Evidence recognizes that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. This is simply another way of saying that the error must be other than harmless to afford any basis for complaint.

3. While this rule governs practice in trial courts, the appellate courts also should follow the same test. *Box v. Swindle*, 306 F.2d 882 (C.C.A. 5th, 1962); *Keaton v. Atchison T. & S.F. Ry*., 321 F. 2d 317 (C.C.A. 7th, 1963). Ultimately, the determination of whether an error is prejudicial rests with the appellate court. The Arkansas Supreme Court has consistently held that harmless error affords no basis for complaint and this rule simply confirms the settled rule of law in this State.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay; Exceptions*. Except as otherwise ordered by the court, no execution or enforcement proceedings shall issue on any judgment or decree until after the expiration of ten (10) days from the entry thereof. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

(b) *Stay on Motion for New Trial or for Judgment*. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) *Injunction Pending Appeal*. When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court from which the appeal is taken, in its discretion, may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay Upon Appeal*. When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule, and except as to child custody orders and similar orders. The bond may be given at or after the time of filing the notice of appeal. After an appeal has been docketed in the appellate court, application for leave to file a bond may be made only in such court.

(e) *Stay in Favor of State or an Agency Thereof*. When an appeal is taken by the State of Arkansas or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

(f) *Power of Appellate Court Not Limited*. The provisions of this rule do not limit any power of the appellate court to stay proceedings during the pendency of an appeal, or to suspend, modify, restore or grant an injunction during the pendency of any appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of Judgment as to Multiple Claims or Parties*. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Reporter's Notes to Rule 62: 1. With the exception of minor wording changes and the omission of certain provisions which are inapplicable to state practice, Rule 62 is substantially the same as FRCP 62.

2. Section (a) omits the reference in FRCP 62 to patent disputes and combines the language of superseded Ark. Stat. Ann. § 30-102 (Repl. 1962) and that of the Federal Rule. This rule does not change prior Arkansas practice concerning the enforcement of judgments. Under both Arkansas and federal law, execution or other enforcement of a judgment or decree is automatically stayed for a ten-day period unless specifically directed by the trial court. *Whetstone v. Atlas Drilling & Production Co.*, 241 Ark. 387, 409 S.W.2d 322 (1966); *FDIC v. Steinman*, 53 F. Supp. 644 (D.C. Pa., 1943). Under the Federal Rule, the ten-day stay is more or less mandatory and the trial court is given little discretion to waive such period. The Committee recognized that there are situations, however, where execution or other enforcement should not be delayed; therefore, Rule 62 was drafted so as to retain the trial court's discretion to waive this ten-day period.

3. Section (a) does work one minor change in prior Arkansas practice. Under superseded Ark. Stat. Ann. § 30-102 (Repl. 1962), no action could be taken within ten days after rendition of the judgment unless otherwise ordered by the court. Such language permitted the execution on a judgment even before it was actually filed. Under Rule 62, no action can be taken until ten days after the entry or filing of the judgment or decree unless ordered by the court.

4. The portion of Section (a) dealing with stays and appeals in cases involving interlocutory orders and injunctions is substantially the same as superseded Ark. Stat. Ann. § 27-2102 (Repl. 1962). Under that statute and the Federal Rule, such proceedings are not stayed unless otherwise ordered by the court.

5. Section (b) is identical to its counterpart in FRCP 62. There was no specific provision under prior Arkansas law to stay an execution or other enforcement proceedings during the pendency of post-judgment motions and it was doubtful that a trial court had the power to stay execution beyond the ten-day period normally allowed. *Taylor v. O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932). Thus, this rule confers upon the trial court power which it did not apparently have under prior law.

6. With the exception of the omission of the last sentence in FRCP 62(c), Rule 62 is otherwise identical to the former. The omitted provision simply has no applicability to state practice. There was no specific authority under prior Arkansas law which permitted an injunction during an appeal and this rule does add such authority. This authority is discretionary, however, and generally requires a finding that the applicant is likely to succeed on appeal; that irreparable harm will result unless it is granted and that no substantial harm is likely to result to the other party. *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685 (C.C.A. 5th, 1968); *Bauer v. McLaren*, 332 F. Supp. 723 (D.C. Iowa, 1971).

7. Section (d) is a modified version of FRCP 62(d) and basically follows prior Arkansas law as codified in superseded Ark. Stat. Ann. §§ 27-2119, et seq. (Repl. 1962) and should not work any changes in Arkansas practice and procedure.

8. Section (e) is revised from the Federal Rule so as to make it compatible with state practice. This section follows prior Arkansas law which did not require the posting of a bond or other security in order to stay proceedings pending an appeal prosecuted by the State of Arkansas. Superseded Ark. Stat. Ann. § 34-215 (Repl. 1962). It is, however, incumbent upon the State, or its officers or agents, to cause the trial court to specifically stay the proceedings even though security is not required.

HISTORY

Amended November 11, 1991, effective January 1, 1992.

Rule 63. Disability of a Judge.

If for any reason, including resignation or removal from office, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are announced or filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but, if such judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion, grant a new trial.

Reporter's Notes to Rule 63: 1. Rule 63 is substantially identical to FRCP 63. The applicability of this rule is limited to those situations where a trial judge, for any reason, becomes unable to perform his duties under these rules during the period after a decision or verdict has been given and before the appellate court obtains jurisdiction. Although this rule gives the succeeding judge the authority to grant a new trial if he cannot satisfactorily perform the duties required of him, the decisions previously made by the former judge and the jury are presumed to be correct and

the burden is on the moving party to show to the contrary. *Miller v. Penn R. Co*., 161 F. Supp. 633 (D.C, 1958).

2. Because of its limited applicability, FRCP 63 has caused little or no controversy since its adoption and it has never been amended. Accordingly, it is not believed that Rule 63 will have any significant impact upon Arkansas practice and procedure.

Rule 64. Addition and Withdrawal of Counsel.

(a) When additional counsel is employed to represent any party in a case, said counsel shall immediately cause the clerk to enter his or her name as an attorney of record in the case and shall also immediately notify the court and opposing counsel that he or she has been employed in the case.

(b) Except as provided in Rule 87 of these rules, a lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pending. Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefor to the court showing counsel (1) has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel; (2) has delivered or stands ready to tender to the client all papers and property to which the client is entitled; and (3) has refunded any unearned fee or part of a fee paid in advance, or stands ready to tender such a refund upon being permitted to withdraw.

COMMENT

Reporter's Notes to Rule 64: Prior to 1984, there was no Rule 64. The Rule was adopted in 1984 to state the procedural requirements for withdrawal of counsel which had been addressed in Rule 9 of the Uniform Rules for Circuit and Chancery Courts. The new Rule is based upon DR2-2110 of the Code of Professional Conduct [superseded].

Reporter's Notes, 1987 Amendment: As adopted in 1984, Rule 64 dealt only with withdrawal of counsel, a topic also covered by Rule 9 of the Uniform Rules for Circuit and Chancery Court. The 1987 amendment addresses the employment of additional counsel, an issue heretofore covered by Rule 8 of the Uniform Rules. The amendment makes no change in existing law.

Reporter's Notes (2017): Subdivision (a) was amended to add, "Except as provided in Rule 87 of these rules," upon the adoption of Rule 87.

HISTORY

Adopted July 9, 1984, effective September 1, 1984; amended July 6, 1987, effective September 21, 1987; amended December 14, 2017, effective December 14, 2017.

Rule 65. Injunctions and Temporary Restraining Orders.

(a) *Preliminary Injunction*.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits*. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) *Temporary Restraining Order*.

(1) *Issuing Without Notice*. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration*. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing*. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve*. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) *Security*. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. Neither the State of Arkansas, its officers, nor its agencies are required to give security.

(d) *Contents and Scope of Every Injunction and Restraining Order*.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with the parties and the parties' officers, agents, servants, employees, and attorneys.

Reporter's Notes to Rule 65: 1. Rule 65 marks a significant departure from FRCP 65. Whereas the latter makes a distinction between preliminary injunctions and temporary restraining orders, this rule treats them equally insofar as the procedures are concerned for obtaining either remedy. Thus, where it appears from affidavit or verified complaint that irreparable harm will or might result, the court has the authority to issue a preliminary injunction or temporary restraining order without notice to the opposing party. Under FRCP 65, notice is always a requirement for the issuance of a preliminary injunction.

2. This rule (a)(1) is generally in accord with prior Arkansas law. Superseded Ark. Stat. Ann. § 32-201 (Repl. 1962) provided that the court could direct that reasonable notice be given to the party against whom an injunction was sought. Superseded Ark. Stat. Ann. § 32-202 (Repl. 1962) required mandatory notice when a defendant had already answered and superseded Ark. Stat. Ann. § 32-103 (Repl. 1962) provided for the issuance of a temporary injunction without notice in certain instances as where irreparable harm was threatened. However, superseded Ark. Stat. Ann. § 32-203 (Repl. 1962) provided that in a number of specific instances, notice was required on an application for a preliminary injunction. This rule (a)(1) is designed to simplify prior Arkansas law by providing for the issuance of a preliminary injunction or temporary restraining order without notice only where it appears that irreparable harm or injury will or might result. In all other instances, notice of such application is required. Rule (a)(2) requires prior notice and a bond before a preliminary restraining order or injunction may be effective as against designated businesses.

3. Section (b) is designed to afford a hearing to the person against whom an injunction or temporary restraining order has been issued without notice. Substantial rights are often affected and for this reason, such hearings should be heard as expeditiously as possible. Where the hearing is held on the right of the applicant to have an injunction or restraining order issued, the court may delay the hearing until the entire case can be heard on the merits. Where harm may

result, however, from such delay, the better practice is to proceed with the hearing on such application.

4. Section (d) deviates substantially from the security provisions of the Federal Rule and also changes prior Arkansas law. Under this rule, the trial court is vested with discretion to determine when security is required and the amount of such security when required. Both FRCP 65 and superseded Ark. Stat. Ann. § 32-206 (Repl. 1962) require the posting of adequate security as a condition precedent to the issuance of a preliminary injunction; therefore, this section does modify prior Arkansas law. Under this rule, preliminary injunctions and temporary restraining orders are placed on equal footing and since the trial court is in the best position to know whether security should be required, it is given the discretion to make such a determination.

5. Section (e) is identical to FRCP 65(d) and is designed to insure specificity in the drafting of injunctions and restraining orders. The intent is to ensure that there is no doubt or confusion as to the conduct enjoined or restrained. Likewise, this section makes clear the identity of all persons who are bound by the injunction or order. This provision should have little effect on Arkansas practice and procedure.

6. Section (e) of FRCP 65 is omitted and Section (f) is added to this rule. The latter section simply provides that disobedience of any injunction or order may be treated as a contempt by the court. Prior Arkansas law in this area was codified as superseded Ark. Stat. Ann. § 32-401 (Repl. 1962) although it is doubtful that specific statutory authority was necessary to enable the court to punish one for violating the terms of an injunction or restraining order.

Addition to Reporter's Notes, 2011 Amendment: Rule 65 has been completely rewritten and is now substantially identical to Federal Rule 65 as amended in 2009. Rule 65 as adopted in 1979 departed significantly from the corresponding federal rule. Contrary to the approach of the federal rule and that of most states, the original Arkansas Rule 65 treated preliminary injunctions and temporary restraining orders as equivalent, allowing issuance of either without notice to the adverse party. Subsections (a) and (b) of the amended rule provide for issuance of a temporary restraining order without notice to the adverse party but require notice to the adverse party prior to issuance of a preliminary injunction.

The amendment eliminates former subsection (a)(2) that limited the availability of ex parte injunctive relief in some circumstances. The revised rule provides a number of enhanced procedural protections for persons or entities against whom ex parte injunctive relief is sought, including: that an affidavit or verified complaint state specific facts showing the harm that will result to the movant before the adverse party can be heard; that the movant's attorney certify in writing any efforts made to give notice and why notice should not be required; that a temporary restraining order issued without notice describe the circumstances underlying its issuance; that the temporary restraining order must expire not later than 14 days after entry unless for good cause or with the adversary's consent it is extended; and that the hearing on the temporary restraining order be set for the earliest possible time and take precedence over other matters. In addition, the party against whom the order is issued may appear and move to dissolve or modify the order upon 2 days' notice to the party who obtained the temporary restraining order without notice.

In subsection (c) the amended rule conditions issuance of a preliminary injunction or temporary restraining order on the movant's giving security determined by the court and section (d)(1) prescribes the contents of the injunction or restraining order. Subsection (d) specifies the persons bound by the order.

Rule 65.1. Security; Proceedings Against Sureties.

Whenever these rules require or permit the giving of security by a party and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the sureties if their addresses are known.

Reporter's Notes to Rule 65.1: 1. With the exception of the deletion of the references to admiralty and maritime claims, Rule 65.1 is otherwise identical to FRCP 65.1. This rule does not work any changes in Arkansas law as the substance of the rule has heretofore been in effect. Superseded Ark. Stat. Ann. § 27-2107.3 (Repl. 1962), which governed supersede as bonds was almost verbatim with this and FRCP 65.1.

2. With reference to bonds which were posted in order to obtain injunctive relief, superseded Ark. Stat. Ann. § 32-310 (Repl. 1962) provided essentially the same procedure for reducing a claim against a surety to judgment.

Rule 66. Receivers.

(a) *Appointment*. Circuit courts may appoint receivers for any lawful purpose when such appointment shall be deemed necessary and proper. The receiver shall give bond, with sufficient security, in an amount to be approved by the court, for the benefit of all persons in interest. The receiver shall likewise take an oath to faithfully perform the duties reposed in him by the court.

(b) *Reports.* The receiver shall make a report of his proceedings and actions every six (6) months or at such other times as directed by the court. All moneys or property collected by the receiver shall be accounted for and deposited into court or otherwise be subject to the orders of the court.

(c) *Employment of Others*. Subject to the approval of the court, the receiver shall have power to employ an attorney, an accountant or such other persons as may be necessary to conduct the business or affairs entrusted to the receiver. The wages or fees paid by the receiver shall be paid as an expense from the assets collected by him.

(d) *Removal*. Receivers may be removed at any time by the court for good cause. Substitute receivers shall be subject to the same requirements as the previous receiver.

(e) *Dismissal of Action*. No action wherein a receiver has been appointed shall be dismissed except by order of the court.

Reporter's Notes to Rule 66: 1. Rule 66 varies substantially in form from FRCP 66. Whereas the latter attempts to incorporate by reference existing federal statutes dealing with receiverships, this rule attempts to define the procedures used in receiverships.

2. Receiverships were formerly governed by superseded Ark. Stat. Ann. §§ 36-101, et seq. (Repl. 1962). The procedure remains essentially the same under Rule 66 as it did under prior Arkansas law. No attempt has been made to define and identify those situations in which the appointment of a receiver is proper; accordingly, resort must still be made to traditional equitable grounds for the appointment of a receiver. This rule is not intended to cover receivers appointed pursuant to Ark. Stat. Ann. § 66-4805 (Repl. 1966) for insolvent insurance companies. The latter involves the insurance commissioner as the statutory receiver and the insurance code contains specific provisions for such receiverships.

3. Following the example of superseded Ark. Stat. Ann. § 36-104 (Repl. 1962), no attempt has been made to define the powers of a receiver. The extent of such powers must be determined by reference to traditional equitable principles. This power is largely determined by the court which should exercise close supervision and control over the receiver's actions.

Addition to Reporter's Notes, 2003 Amendment: In light of Constitutional Amendment 80, the reference to "courts of equity" in subdivision (a) has been replaced with "circuit courts."

HISTORY

Amended March 13, 2003.

Rule 67. Deposit in Court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money or property paid into court under this rule shall not be withdrawn except upon the express, written order of the court and shall be delivered only to the person determined by the court to be entitled thereto.

Reporter's Notes to Rule 67: 1. Rule 67 is a slightly modified version of FRCP 67. The only variation is found in the last sentence and this change is designed to safeguard the money or object on deposit by insuring that it shall not be released without the express, written order of the court and only then to the person whom the court has determined to be entitled to possession.

2. Prior Arkansas law was codified as superseded Ark. Stat. Ann. § 27-1601 (Repl. 1962). Under this rule, however, a party must initiate the deposit as opposed to having the court take the initiative. The deposit must be with leave of the court and upon notice to the opposing party.

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the

service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability. For purposes of this rule, the term "costs" is defined as reasonable litigation expenses, excluding attorney's fees.

Reporter's Notes to Rule 68: 1. With the exception of one minor change, Rule 68 is otherwise identical to FRCP 68. This change simply provides for the entry of judgment where an offer of judgment has been accepted as opposed to the provision found in FRCP 68 which authorizes the clerk to enter judgment. This rule is not concerned with the mechanics of preparing and entering the judgment and resort to Rule 58 is necessary to find the procedure for preparing and entering judgment.

2. This rule is substantially the same as superseded Ark. Stat. Ann. §§ 27-1501, et seq. (Repl. 1962). It does, however, follow the provision of FRCP 68 concerning the time for accepting an offer of settlement. Thus, a party is given ten days to accept such an offer as opposed to the five-day period allowed under prior Arkansas law. The purpose behind this rule and FRCP 68 is to encourage the early settlement of claims and to protect the party who is willing to settle from the expense and burden of costs which subsequently accrue. *Staffend v. Lake Cent. Airlines, Inc*., 47 F.R.D. 218 (D.C, Ohio, 1969).

Addition to Reporter's Notes, 1988 Amendment: The amendment broadens the definition of the term "costs" for purposes of this rule. In *Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc*., 294 Ark. 427, 743 S.W.2d 804 (1988), the Supreme Court held that, as used in this rule, the term "costs" is limited to costs authorized by statute, a result consistent with prior cases adopting a narrow definition of the term in other contexts. However, a broader approach is warranted with respect to this rule, which is designed to encourage early settlement. The amended rule thus permits assessment of not only those costs authorized by statute, but also reasonable expenses typically incurred in the course of litigation. As a result, expenses disallowed under *Darragh*—e.g., meals and lodging—are now available under the amended rule. Attorney's fees, however, are expressly excluded from the new definition.

HISTORY

Amended November 21, 1988, effective January 1, 1989.

Rule 69. Execution Discovery.

In aid of a judgment or execution, a judgment creditor or his successor in interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Reporter's Notes to Rule 69: Prior to 1984, there was no Rule 69. The Rule was adopted in 1984 to make the discovery procedures available to parties pursuing execution. The Rule is not intended to supersede the independent action for discovery found in Ark. Stat. Ann. §§ 30-901 through 30-908 (Repl. 1979), however, it supersedes Ark. Stat. Ann. § 30-906 (Repl. 1979), as it is to an extent duplicative of that section.

HISTORY

Adopted July 9, 1984, effective September 1, 1984.

Rule 70. Judgment for Specific Acts; Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the jurisdiction of the court, in lieu of directing a conveyance thereof, it may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Reporter's Notes to Rule 70: 1. With the exception of minor wording changes to adapt FRCP 70 to state practice, Rule 70 is substantially the same as the Federal Rule. This rule applies only after judgment has been entered, *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 65 S. Ct. 1130 (1945), and gives the trial court power to deal with parties who refuse to obey and comply with orders to do specific acts. The acts contemplated by this rule have traditionally been ordered by equity courts and it is likely that such courts will have more occasion to exercise the authority conferred by this rule. The rule is not limited, however, to equity cases and under proper circumstances, law courts may well exercise the authority conferred therein.

2. This rule does not purport to grant additional authority to a trial court to affect title to property outside the jurisdiction of the court. It simply recognizes the traditional jurisdictional limits of courts and in no way attempts to enlarge such limits.

3. This rule does not affect Ark. Stat. Ann. § 29-128 (Repl. 1962) which requires that any decree which orders a conveyance or passing of title to real property be recorded in the county wherein the real property is located within one year from the entry of the decree.

4. This rule recognizes the inherent power of the court to adjudge a party in contempt for disobedience to its order and judgment. This power has also been recognized in Ark. Stat. Ann. § 34-901(3) (Repl. 1962).

Rule 71. Process in Behalf of and Against Persons Not Parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Reporter's Notes to Rule 71: 1. Rule 71 is identical to FRCP 71. The Federal Rule has remained unchanged since its adoption and has provoked little controversy. It does not attempt to say when an order can be made in favor of or against a person not a party. Rather it merely provides that when this can be done, non-parties have recourse to, and are subject to, process in the same manner as parties. Wright & Miller, *Federal Practice and Procedure,* Section 3031.

2. Prior Arkansas law contained no comparable provision. Normally, under prior law, a judgment, order or decree was ineffective against a person not a party to the action. Superseded Ark. Stat. Ann. § 29-107 (Repl. 1962). There are situations, however, where even without specific statutory authority, the Arkansas courts have permitted a non-party to enforce an order or to enforce an order against a non-party, i.e., where an assignee of a purchaser at a judicial sale obtains a writ of assistance or where an injunction is enforced against a non-party who has knowledge of the provisions of the order. *Hudkins v. Ark. State Bd. of Optometry*, 208 Ark. 577, 187 S.W.2d 538(1945); *Hickinbotham v. Williams*, 228 Ark. 46, 305 S.W.2d 841 (1957).

Rule 72. Suits in Forma Pauperis.

(a) Every indigent person who shall have a cause of action may petition the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute the suit in forma pauperis.

(b) All such petitions shall be accompanied by an assertion of indigency, verified by a supporting affidavit. The affidavit form is set out below. Any petition not in compliance with this provision will be returned to the petitioner. There shall be attached to the petition a copy of the complaint or proposed complaint.

(c) The court shall make a finding regarding indigency based on the affidavit. In making its determination, the court may consider the current federal poverty guidelines which may be obtained from the Administrative Office of the Courts. If satisfied from the facts alleged that the petitioner has a colorable cause of action, the court may by order allow the petitioner to prosecute the suit in forma pauperis. Every person permitted to proceed in forma pauperis may prosecute the suit without paying filing fees and other fees charged by the clerk and shall not be prevented from prosecuting the suit by reason of being liable for the costs of a former suit brought against the same defendant.

(d) No person shall be permitted to prosecute any action of slander, libel or malicious prosecution in forma pauperis.

(e) The form of the affidavit shall be as follows:

IN THE _____ COURT _____, COUNTY,

ARKANSAS

IN RE PETITION OF _____

TO PROCEED IN FORMA PAUPERIS

NO.___

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, _____, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No___

(a) If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

(b) If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

(a) Business, profession or any form of self-employment? Yes ___ No___

(b) Rent payments, interest or dividends? Yes ___ No___

(c) Pensions, annuities or life insurance payments? Yes___ No___

(d) Gifts or inheritances? Yes ___ No ___

(e) Any other sources? Yes ___ No ___ If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?

Yes ___ No ___

If the answer is yes, state the total amount in each account.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ___ If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

[6. TO BE COMPLETED ONLY IF PETITIONER IS INCARCERATED IN THE ARKANSAS DEPARTMENT OF CORRECTION OR ANY OTHER PENAL INSTITUTION.

Do you have any funds in the inmate welfare funds?

Yes ___ No ___

If the answer is yes, state the total amount in such account and have the certificate found below completed by the authorized officer of the institution.]

I understand that false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____ Signature of Petitioner

STATE OF _____

COUNTY OF_____

Petitioner, _____, being first duly sworn under oath, presents that he/she has read and subscribed to the above and states that the information therein is true and correct.

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2____.

_____

Notary Public

My commission expires: _____

[(To be completed by authorized officer of penal institution)

CERTIFICATE

I hereby certify that the petitioner herein, _____, has the sum of $_____ on account to his/her credit at the _____ institution where he/she is confined.

I further certify that petitioner likewise has the following securities to his/her credit according to the records of said institution:

_____

Authorized Officer of Institution]

COMMENT

Reporter's Notes: New Rule 72 tracks, with some changes, the former statutory provisions governing suits by indigents. A similar rule was proposed in 1986 but was withdrawn by the Supreme Court prior to its effective date. The former statutes, Ark. Stat. Ann. §§ 27-401, 27-403 to -406 (Repl. 1979), were repealed by Act 208, 75th General Assembly, in 1985. Section 27-402 [Ark. Code Ann. 16-58-133 (1987)], adopted in 1981 to replace an earlier provision, was not repealed; however, it is superseded by this rule, which contains in paragraph (b) the requirements of 27-402. The new rule departs from the former statutes and the rule previously proposed by the Court in two ways. First, the rule does not require that the trial court assign counsel, without fee, for the petitioner. Second, the rule does not include the statutory provision allowing the trial court, in its discretion, to annul the in forma pauperis order in the event of "improper conduct" or "willful or unnecessary delay" on the part of the petitioner. The Rules of Civil Procedure contain adequate sanctions that the court may employ in the event of such misconduct. Rules 73-76. [Reserved.]

Reporter's Notes, 2019: Subdivision (a) was amended to delete "against another" in the first sentence, which had been a source of confusion to some as to its effect on the scope of the rule.

HISTORY

Amended December 21, 1987, effective March 14, 1988; amended and effective by per curiam order February 23, 2012.; amended October 18, 2018, effective January 1, 2019.

Rule 77. Courts and Clerks.

(a) *Court Hours*. Courts shall be deemed open as specified in subsection (c) hereof for the purpose of filing any pleading or other paper; of issuing and returning process; and of making and directing all interlocutory motions, orders and rules. Pleadings and other papers may be filed with the judge as provided in Rule 5(d).

(b) *Trials and Hearings*. All trials and hearings shall be public except as otherwise provided by law, such as, for example, Ark. Code Ann. § 16-13-222.

(c) *Clerk's Office and Orders of Clerk*. The clerk's office with the clerk or deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne or final process and for any other proceedings which do not require allowance or order of the court are grantable of course by the clerk, but his action may be suspended, altered or rescinded by the court upon good cause shown.

COMMENT

Reporter's Notes to Rule 77: 1. Rule 77 varies substantially from FRCP 77 and attempts to track prior Arkansas procedure. Overall, this rule does not make any significant changes in prior Arkansas law.

2. Under FRCP 77(a), the court is always considered open for the purpose of filing papers. This is consistent with FRCP 5(e), which permits the filing of papers with the judge personally, regardless of whether it is during the usual office hours of the court.

3. Although Ark. Stat. Ann. §§ 22-312 and 22-407 (Repl. 1962) seem to suggest that circuit and chancery courts are always open as provided in FRCP 77, the meaning is not the same. Under Arkansas law, the term "court always open" is intended to signify that a court remains in session continuously from the beginning of its term until the end thereof. Under the Federal Rule, a court is always open in the sense that papers can always be filed with the judge or clerk, regardless of whether the clerk's office is open. *Casalduc v. Diaz,* 117 F.2d 915, cert. denied, 314 U.S. 639, 62 S. Ct. 74 (1941).

4. Section (b) differs from FRCP 77(b) and simply provides that unless otherwise provided by law, all hearings and trials shall be held in public.

5. Section (c) does not attempt to define the holidays when the clerk's office may be open or closed. Reference to Rule 6(a) is necessary to find the definition of a legal holiday.

6. FRCP 77(d) is deemed unnecessary under Arkansas practice. Since the clerk does not prepare the judgment, there does not appear to be any necessity for the clerk to serve notice that a judgment has been entered. This is particularly true since counsel normally prepares the judgment and opposing counsel is afforded an opportunity to approve same.

Addition to Reporter's Notes, 2014 Amendment: Rule 77(b) prescribes that all trials and hearings are to be public except as otherwise provided by law. The rule cited Ark. Code Ann. § 16-13-318 as an example of an exception to the public-trials-and-hearings requirement of the rule. Section 16-13-318 was repealed by Act 1185 of 2003 and replaced by superseding statute, Ark. Code Ann. § 16-13-222. Subsection (b) of the rule is amended to cite the correct statute.

HISTORY

Amended November 11, 1991, effective January 1, 1992; amended March 13, 2014, effective July 1, 2014.

Rule 78. Motion Day and Hearings on Motions.

(a) *Motion Day*. Unless local conditions make it impracticable, each court shall establish regular times, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time and on such notice as is reasonable, may make orders for the advancement, conduct and hearing of such motions.

(b) *Motions, Responses, and Replies*. The form and content of motions, responses, and replies are governed by Rule 7(b). The timing of motions, responses, and replies is governed by Rule 6(c).

(c) *Hearing; Waiver*. The court, upon notice to all parties, may hold a hearing on a motion only after the time for reply has expired; however, the court may hear a proper ex parte motion at any me. Unless a hearing is requested by counsel or is ordered by the court, a hearing will be deemed

waived and the court may act upon the matter without further notice after the time for reply has expired.

(d) *Mandamus and Prohibition*. Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the circuit court having jurisdiction to fix and announce a day of court to be held no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause.

Reporter's Notes to Rule 78: 1. Rule 78 differs considerably from FRCP 78. Under the latter, the federal courts are given broad discretion to formulate their own local rules concerning the disposition of motions. Thus, there is no requirement of uniformity of rules. This rule, however, tracks prior Arkansas law in an attempt to ensure uniformity in the method of hearing and deciding motions.

2. Under this rule, courts are not required to conduct motion days if local conditions make them impractical. This is a change from prior law as superseded Ark. Stat. Ann. § 27-1724 (Repl. 1962) required a motion day to be held on the first day of each term. Motion days are thus permissive under this rule whereas they were mandatory under prior Arkansas law.

3. Sections (b) and (c) of this rule are slightly modified versions of sections (b), (c), (d) and (e) of Rule 2 of the Uniform Rules for Circuit and Chancery Courts in this State. The idea is to have uniformity in the area of motions and Rule 2 of the Uniform Rules largely achieved this goal. Hence, its provisions are carried forwarded [forward] in Rule 78.

Additions to Reporter's Notes, 1984 Amendments: Rule 78(b) is amended by adding the last sentence of the subsection to assure that no court will consider it necessary to grant a frivolous motion even though there has been no response to the motion.

Court's Notes, 1995 Amendment: Subsection (d) is added to modify the effect of Act 582, 1, of 1991 which amended Ark. Code Ann. § 16-115-104 (Supp. 1993). Act 582 increased the time to hear writs of prohibition and mandamus to 45 days. The Court has concluded that the abbreviated procedure formerly prescribed in Ark. Code Ann. § 16-115-104 is necessary in election matters because of their urgency.

Addition to Reporter's Notes, [February] 2001 Amendment: The title of subdivision (b) has been changed—from "Briefs" to "Motions, responses and briefs"— to more accurately reflect its contents. Also, a new sentence has been added at the end of the subdivision excepting summary judgment motions and responses from its time frames. As amended in 2001, Rule 56(c) governs the timing of motions and responses under that rule.

Addition to Reporter's Notes, [May] 2001 Amendment: Subdivision (d) has been deleting the words "judge or chancellor" and replacing them with "circuit court." Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

Addition to Reporter's Notes, 2002 Amendment: The provisions of subdivision (b) have been deleted and replaced with cross-references to Rule 6(c), which now governs the timing of motions, responses, and replies, and to Rule 7(b), which now governs their content. Under the

new first sentence of subdivision (c), the court may not hold a hearing on a motion, except one that may properly be heard ex parte, until the time for reply has expired. A similar provision was added to Rule 56(c), which applies to motions for summary judgment, in 2001. The title of subdivision (c) has been revised to make plain that it does not refer simply to waiver of hearings, and stylistic changes have been made in subdivision (d).

HISTORY

Amended July 9, 1984, effective September 1, 1984; amended November 13, 1995; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002.

Rule 79. [Abolished.]

Rule 80. Admissibility of Testimony at Prior Trial.

When admissible, the testimony of any witness given in any court at any former trial between the same parties or their privies and involving the same issue or claim for relief may be proved by the duly certified transcript thereof.

Reporter's Notes to Rule 80: 1. Rule 80 is a slightly revised version of FRCP 80. Superseded Ark. Stat. Ann. § 28-713 (Repl. 1962) contained the grounds for admitting former testimony although Rule 804 of the Uniform Rules of Evidence now contains such grounds. The question, therefore, as to when former testimony is admissible is determined by Rule 804. When it is admissible, it is proved under this rule.

Rule 81. Applicability of Rules.

(a) *Applicability in General.* These rules shall apply to all civil proceedings cognizable in the circuit courts of this state except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

(b) *Actions Appealed from Lower Court*. These rules shall apply to civil actions which are appealed to a court of record and which are triable de novo.

(c) *Procedure Not Specifically Prescribed*. When no procedure is specifically prescribed by these rules, the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, these rules or any applicable statute.

COMMENT

Addition to Reporter's Notes, 2001 Amendment: The reference to chancery and probate courts in subdivision (a) has been deleted in light of Constitutional Amendment 80, which abolished these courts and established circuit courts as the "trial courts of original jurisdiction" in the state.

Addition to Reporter's Notes, 2008 Amendment: Subdivision (b) of this rule has been amended to eliminate the circuit court's discretion about pleading again. The 2008 amendment to

District Court Rule 9 requires pleading again in every civil case appealed to circuit court from district court. The change here conforms the two rules.

HISTORY

Amended May 24, 2001, effective July 1, 2001; amended October 9, 2008, effective January 1, 2009.

Rule 82. Jurisdiction and Venue Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of circuit courts in this state or the venue of actions therein.

Reporter's Notes to Rule 82: 1. Rule 82 tracks FRCP 82. It makes it clear that these rules are intended to be procedural only and do not affect any substantive issues such as venue and jurisdiction. These rules assume that venue and jurisdiction are proper. Whether this is true depends upon substantive law and due process requirements.

Addition to Reporter's Notes, 2001 Amendment: The reference to chancery and probate courts has been deleted in light of Constitutional Amendment 80, which abolished these courts and established circuit courts as the "trial courts of original jurisdiction" in the state.

HISTORY

Amended May 24, 2001, effective July 1, 2001.

Rule 83. [Abolished.]

Rule 84. Uniform Paper Size.

All pleadings, motions, interrogatories, requests for admissions, responses to discovery requests, depositions, briefs, findings, judgments, orders, and other papers required or authorized by these rules shall be on 81/2" x 11" paper.

HISTORY

Adopted May 15, 1989.

Rule 85. Title.

These rules may be known and cited as the Arkansas Rules of Civil Procedure (ARCP).

Rule 86. Effective Date.

These rules will take effect on July 1, 1979.

Rule 87. Limited Scope Representation.

(a) *Permitted.* In accordance with Rule 1.2(c) of the Arkansas Rules of Professional Conduct, an attorney may provide limited scope representation to a person involved in a court proceeding.

(b) *Notice.* An attorney's role may be limited as set forth in a notice of limited scope representation filed and served prior to or simultaneously with the initiation of a proceeding or initiation of representation, as applicable. Such notice shall not be required in matters where an attorney's representation consists solely of the drafting of pleadings, motions, or other papers for an otherwise self-represented person as provided in subdivision (c) of this rule.

(c) *Drafting of Pleadings, Motions, and Other Papers.*

(1) An attorney may draft or help to draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney shall include a notation at the end of the prepared document stating: "This document was prepared with the assistance of [insert name of attorney], a licensed Arkansas lawyer, pursuant to Arkansas Rule of Professional Conduct 1.2(c)." The attorney need not sign that pleading, motion, or other paper.

(2) An attorney who provides drafting assistance to an otherwise self-represented person may rely on the self-represented person's representation of facts, unless the attorney has reason to believe that such a representation is false or materially insufficient.

(d) *Termination.* The attorney's role terminates without the necessity of leave of court upon the attorney's filing a notice of completion of limited scope representation with a certification of service on the client.

(e) *Service.* Service on an attorney providing limited scope representation is required only for matters within the scope of the representation as set forth in the notice.

Reporter's Notes (2017): This rule was added following 2016 amendments to Rules 1.2, 4.2, and 4.3 of the Ark. R. Prof'l Conduct that clarified the ethical responsibilities of attorneys who provide limited-scope representation.

Rule 88. Virtual and Blended Court Proceedings.

(a)The court has discretion to conduct hearings or trials as "virtual" or "blended"proceedings as set forth in this Rule.

(1) "Virtual proceedings" are proceedings in which all parties, counsel, the court reporter, witnesses, and the judge are simultaneously participating in the proceeding via electronic means.

(2) "Blended proceedings" are proceedings in which at least two of the aboveindividuals are participating in the proceeding from the physical courtroom and at leastone of the above is participating simultaneously via electronic means.

(b) Hearings or non-jury trials may be conducted as "virtual" or "blended"proceedings upon a determination by the court of the following:

(1) Procedures are in place to protect the constitutional, statutory, andprocedural rights of parties;

(2) Means exist for taking and preserving a concurrent record;

(3) Clear and practical procedures are in place for the consideration ofevidence;

(4) The technical ability exists for all necessary individuals to participatemeaningfully; and

(5) The public has access to any proceedings that would otherwise be open.

(i) Public access may be satisfied by the virtual proceedings being simulcast in the physical courtroom upon request of any member of the public present at the courtroom.

(ii) A virtual hearing shall require that public notice be posted on the door of the courtroom or other regular place for posting scheduling notifications at least one hour prior to the beginning of the virtual hearing or trial. The public notification for the virtual hearing shall include instructions and contact information for requesting access to view the virtual hearing either in the courtroom or by other means that may be available, as determined by the circuit court.

(iii) No additional measures are necessary for blended proceedings solong as the audio/visual display in the courtroom is sufficient for members of the gallery to witness the proceedings reasonably.

(c) Jury trials may be blended only as to specific witnesses or the court reporter at the discretion of the judge, given the safeguards described under section (b) above aremet, but parties, counsel, the judge, and the jury must all be present in the physical courtroom.

(d) Requests for "virtual" or "blended" proceedings may be raised as follows:

(1) The parties by joint motion may manifest their agreement to "virtual" or"blended" proceedings as set forth in this Rule.

(2) Any party may move the court to conduct "virtual" or "blended"proceedings as set forth in this Rule.

(i) The motion must set forth how the safeguards in section (b) of thisRule are to be met.

(ii) The motion may not be granted absent an opportunity for allparties to respond under these Rules and be heard.

(3) The court on its own motion may notify the parties of its intent to conduct a hearing or trial as "virtual" or "blended" proceedings.

(i) The notice must set forth how the safeguards in section (b) of thisRule are to be met.

(ii) The court may not proceed with "virtual" or "blended" proceedings absent an opportunity for all parties to be heard.

(e) Virtual or blended circuit court proceedings may not be broadcast, recorded, photographed,or otherwise published by anyone except the court in order to comply with section (b)(5) or as otherwise allowed under the conditions described in Arkansas Supreme Court Administrative Order No. 6.

History.

Adopted May 19, 2022, effective June 1, 2022.

Rule 89

[Reserved]

Rule 90

[Reserved]